RECOMMENDATIONS FOR THE CONCLUSION OF CONSTRUCTION CONTRACTS AND FOR THE CONSTRUCTION OF BUILDINGS

Budapest, 2019

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Authors:
Dormán József
Dr. Egri Péter
Gönczöl Péter
Dr. Marton Pál
Mezei József
Peterka Attila
Dr. Rákosi Tímea
Sebők Tibor
Wéber László

Editor:
Wéber László

Proofreading:
Szalados László
Varga Katalin dr.
Vermesy Sándor

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Our motto:

„When we dream alone it is only a dream, but when many dream together it is the beginning of a new reality." Friedensreich Regentag Dunkelbunt Hundertwasser

As the epoch-making architect Hundertwasser put it, alone, in isolation, it is difficult for people to change their environment, and their decisions remain unrealized. If the participants of building works contracts try to negotiate contracts and try to solve the difficult, often risky, tasks with the same thoughts, then we can be sure that a construction industry working in better conditions will give the right answers to the new challenges of the 21 st century. The improvement of contracting conditions is an important aspect of the long-term sustainability of the industry with a history of many thousands of years.

Our publication has been produced in the spirit of such thinking together.

Gönczöl Péter

Introduction

The National Federation of Hungarian Building Contractors (ÉVOSZ) meets the expectations of construction professionals when -- as a professional association -- makes this publication available to a wide range of the practitioners of the construction profession. This compilation proposes aspects and formulations primarily for the conclusion of construction contracts for buildings, but also it is not without recommendations that can be utilized during the performance period too.

The purpose of this publication is to help establish a balanced contractual and working relationship between the parties involved in the construction process of buildings, namely the customer, the designer and the contractor organizations. We are convinced that one of the key prerequisites for the successful implementation of projects is a construction contract that is as appropriate to the interests of the parties involved as possible, in the framework of which the parties can concentrate first of all on the works to be created. Under the conditions of the domestic construction market, the contracts are concluded by equal parties out of their equal and free will, covering all issues which are considered by any of the parties to be essential. The contract thus created provides an appropriate framework for the activities of the contributors and requires constructive and responsible cooperation from the parties during the performance period. With this compilation, which contains suggestions and recommendations, we support the construction of facilities and cooperation. These are general formulations, while each building, each structure is a unique work. Accordingly, the recommendations and suggestions described herein can be applied in different contextual relationships in each construction process. For this end, it is essential to involve professionals with the necessary expertise and legal knowledge in contractual negotiations. With this in mind, we recommend the use of this publication, which deals with contract and construction issues that are typical during the implementation of buildings, grouping the issues around 34 entries. The entries have a uniform structure: the definition is followed by a detailed explanation of the content, and, after the summary of the advantages and disadvantages, a list of the relevant laws closes the entries.

The laws that can be read here, the possibilities for filling out the frameworks such laws offer, and the review of the rules that are not legally regulated, but have developed according to the general rules of practice of the profession would all represent new aspects and systematic knowledge for many small and medium-sized enterprises, but at the same time we believe that large companies can also find relevant issues in this publication. In formulating the entries, we paid attention to the requirement that the application of the entries should not violate the requirements pertaining to the prohibition of the restriction of competition. This publication was written and proofread by professionals with great experience in the construction industry. Also on behalf of these professionals, we ask you to share your experience gained during the use of this publication with the organization of ÉVOSZ that issued this recommendation. The publication is planned to be updated from time to time, taking into account changes in legislation.

We hope that with this publication we can contribute to achieving the goal that a more and more balanced contractual relationship should be characteristic of those involved in the investment and construction processes, and that the professional discussions, which are inevitable during the performance period in most of the cases should remain within the boundaries of partnership.

Budapest, the month of July in 2018

Wéber László

Integrating alternative solutions into the building tasks

1. Concept and characteristics

In construction works tenders, it is increasingly common that the final agreed price and technical content include alternative solutions developed by the contractors. Usually, alternatives are used to reduce construction costs, but there may be many other reasons as well, such as faster implementation or smaller structure size, etc. Generally, alternatives are suggested and developed by contractors to improve their competitive position. Sometimes customers make suggestions to contractors for the pricing of alternative solutions.

From a legal point of view, these types of solutions may be considered as so called alternative services. In such cases, it is advisable for the parties to stipulate in the contract which party (the customer or the contractor) should be entitled to decide which of the alternative solutions should be implemented. In the absence of this, the situation will be governed by the Ptk. (the Civil Code of Hungary), which states that if the obligation can be fulfilled through any obligation from among several ones, the obligor (the contractor) will be entitled to select the one for performance. Civil Code sets out the following too: if the obligee has the right to choose, but he is late in making it, this right shall pass to the obligor.

It is obvious that if the performance of any of the alternative services becomes impossible, the contract shall be limited to the other services (that is, to the remaining alternatives). On the other hand, if the performance of the service has become impossible for a reason attributable to the party who has no right to choose, the other party may choose either the possible service or the consequences of subsequent impossibility – so, in this case, the obligor may decide so that he does not want the remaining, possible alternative, instead he wants to use the rules of impossibility (that is, he essentially claims compensation).

Integrating alternative technical solutions into construction enterprises can bring both benefits (such as cost savings) and risks (other consequences of implementing alternatives to the plan, etc.).

2. Types of alternatives

Product alternatives:

The most common and easiest alternative to contractors is the replacement of the type and make of the materials and equipment planned with their alternatives. The easiest thing to do is to specify the exact details of the proposed other product instead of the type to be installed.

But there may also be a solution to provide a summary of those products only, from which we want to choose, by keeping the technical parameters at the same level. When offering product alternatives, do not forget to draw the attention of the customers to the fact that such alternatives represent a solution with the same or with other technical content, as this may have an effect on other parts of the construction project as well.

Alternative technical solutions:
In order to reduce construction costs, contractors are eager to offer alternative solutions utilizing their accumulated experience, from which they want to forge a competitive advantage. As a result, these solutions may be presented to the customer in a non-elaborated state, with not sufficient detail, so that their competitors can find out the basis of the competitive advantage as hard as possible. In such cases, the customer must act with due care and be aware of the essence of the given technical solution in order to make an informed decision about which solution he should have the contractor to implement.

Alternative technology solutions:
One of the driving forces behind the development of construction technology is that companies should become more competitive on the market. Such improvements make it possible to perform tasks whose solution had not been in reach previously, or to achieve costly, time-consuming tasks faster and cheaper. This technological advancement is represented in the alternative solutions offered, providing more advanced and better solutions for the clients.

3. Advantages-disadvantages

Design risks:
It is important to keep in mind that implementing the proposed alternatives can often lead to changes in the design as well as even the modification of the building permit, and the time and cost implications of this must be taken into account when preparing the offer. In many cases, if the implementation of the alternative would involve significant redesign work, a significant part of the potential cost savings would be lost by the redesign works, making the proposal worthless.

Contractual risks:
It is essential that the alternatives offered during the pre-contract negotiations should be included also in the technical content of the contract. Even in this case, there is a risk is that the solution is rejected from the design side or from other lines, and then we are looking for who is responsible. The more complex the alternative is, laying it down in the contract becomes more complicated. Changes to products can be easily laid down in contracts, while for the technical or technological changes, it is recommended to support them by detailed descriptions or designs.

It is advisable to state in the contract that the person who is entitled to decide on the given alternative must decide at the latest by what deadline. This is important so that the delay of such a decision does not hinder the process of fulfilment, and is also important because after the expiry of the deadline the parties' right to decide reverses according to the Civil Code (Ptk.) (see point 1 above).

It is advisable in advance to know the designers' opinion about the applicability of more complex alternatives.

If the alternative is not included in the contract – and no other provision of the contract provides for a derogation either – the party may only be obliged to implement it if the parties agree thereon by way of an amendment of the contract. Otherwise, the contractor must implement the original technical content.

4. Allocating the cost savings from alternatives

The question always is who should enjoy the savings arising from the offered alternatives.

This depends mainly on when the alternative is offered. If it is offered in the bid phase, the company can use the benefits to strengthen its market position and may decide to pass the larger part to the customer.

If the new solution is introduced in the implementation phase, it is recommended that the greater part of the generated benefits will be given to the contractor’s side, as it is the contractor who is the developer of the proposal, it is he who invests his previous experience, and the customer is only the beneficiary of the contractor’s knowledge. In this case, however, attention should be paid to motivating the customer, because if there is no material result, then it is difficult to have the new solution accepted.

5. Protecting the know-how of the alternative solutions

In addition to the simplest material or product replacements, any publicly unknown solution based on the experience of companies, the technical, economic or organizational knowledge, experience, or the combination thereof, which is recorded in a manner making it suitable for identification, and which represents a property value, shall constitute the company's own know-how and, as such, it is considered a knowledge protected by civil law. If such knowledge is in the contractor’s possession, he should strive to continue to protect the offered solution against other competitors.

6. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 2:47. §, 6:134. §, 6:181. §.

Subcontractors

1. Concept and characteristics

Buildings and constructions that are becoming increasingly complex nowadays can be implemented by general contractors or main contractors with the involvement and use of the more and more specialized professional contractor companies; the most widespread form of such involvement is that these companies are used in the performance of contracts as subcontractors.

The basic rule of subcontracting is included in the Civil Code; which

- states, on the one hand, that the parties may employ others for fulfilling their obligations or exercising their rights – see: Civil Code 6:129. § (1),
- on the other hand, it sets out that any person who employs another person to perform his obligations or exercise his rights shall be liable for the conduct of that person as if he himself had carried out the obligation or exercised the right – see: Civil Code 6:148. § (1).

It is important to know that the parties may also agree that the contractor should not be entitled to use a subcontractor during performance. However, if -- despite this obligation -- the contractor has used a contributor, he is liable also for any damage that would not have occurred without the use of this person (e.g., if applicable, in the event of an unlawful use of a subcontractor, for the consequences of a fire event non-attributable to the subcontractor).

We mention it here that, against the involved persons or organisations, their employer is entitled to enforce his rights for reasons of non-performance, as long as his liability toward the obligee (practically toward the client) exists – see: Civil Code 6:148. § (3).

The quoted law creates the possibility for the involvement of subcontractor(s), and at the same time places a strict obligation on the user (i.e. on the general contractor or the main contractor).

There is another important rule, which, however, is applicable only for contracts between a consumer and a business party (Civil Code 6:104. § (1) h)): in construction contracts, which involve a consumer and a business party, a contract term shall, in particular, be considered unfair if its object or effect is to limit the business party's obligation to be bound by commitments undertaken by its authorized agents.

A reverse situation is also conceivable: when the customer (client) restricts the possibility of a general contractor or of a main contractor to use subcontractors (or a certain subcontractor) – in this respect see sub-clause 3. § (2) f) of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), which stipulates to lay it down in the construction contract if the situation is that the client or the customer won't agree to use subcontractors in the construction works. Because, according to the Civil Code, the use of subcontractor(s) is lawful and permitted as a general rule, all other stipulations differing therefrom must be regulated in the contract - even those cases when although the customer does not prohibit the use of subcontractors to be involved, but binds their use to a prior notification or approval.

We consider it important to emphasize: this constraint should be used

- at the right time, as soon as possible, at the latest when the construction contract is concluded, and it should be included in the text of the contract, and
- it should be based on lawful and objective reasons (that are approved also by the general contractor or the main contractor). This kind of restriction is possible for contracting authorities in one case only, in the public procurement procedures – and we will return to this issue later.

When the aforementioned restriction is in use, it often happens that the customer (client) designates certain subcontractors for the general contractor or the main contractor. There are many possible reasons for this (business, confidence, economic, etc.); we recommend that the following stipulations should be laid down in the contract on the basis of the balance of the construction contract and the principle of reciprocity:

- for what parts of the works and by what date the latest should the customer have the right to do the designation,
- with respect to the designated subcontractor, the general contractor and the main contractor has a right of objection (right of veto), subject to his obligation to give an objective justification,
- agreement is needed on the working conditions and on the spatial organizational conditions of the designated subcontractor: construction villages, temporary outbuildings, auxiliary structures, the use of time-proportional machine costs, and the amount and sum of fees payable for these,
- to whom, and in what timeframe can this be asserted by the general contractor or by the main contractor,
- it is also necessary to agree on the timing of the subcontracting work in question,
- the following should also be laid down in the contract if the designated subcontractor is accepted: the amount of the general activity management costs (general management costs) payable to the general contractor or the main contractor, the amount and level of the corporate overhead costs, the consideration money for the risks and the calculated profit (collectively the collateral).

We believe that full liability for the designated subcontractor is only possible on the basis of a clear (often tripartite) agreement on the terms listed above.

It should also be noted here that the provisions applicable to the subcontractor should be taken into account, where applicable, also in the case of the employment of a collateral manager by the client, in accordance with the provisions of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Sections 17. § – 21/A. §.

2. Subcontractors in public procurement

Act CXLIII. of 2015 on Public Procurement contains special provisions too in connection with subcontractors, in the field of primarily the conflict of interest [see Sections 25. § and 36. § (1)], the grounds for exclusion [see Sections 62. § and 63. §] and the eligibility requirements [see Section 65. §]. This means that only those contractors (subcontractors) who fulfil these public procurement conditions can be involved in the performance of contracts concluded by way of a public procurement procedure. The general contractor or the main contractor must make a statement already in their tender (see Section 67 § (4)) and then, of course, in the contract of implementation, about the fact that the subcontractors actually involved meet (will meet) these requirements.

In addition, the contracting authority may prescribe, pursuant to Section 66. § (6), that the following information shall be indicated in the tender:

- those part (parts) of the public procurement for the performance of which the tenderer intends to employ a subcontractor, and
- to give the names of the already known subcontractors.

The work parts, work types, or subcontractors defined in this way will be included in the contract of implementation, to which the tenderer (the contractor) will be bound.

It is a fundamental rule that, during the performance of the contract, the contractor must notify his customer of all his subcontractors [see Section 138. § (3)], regardless of the fact that he had declared the regularity of their applicability; otherwise the involved contributors must be recorded in the construction log too. Here we come back to the special case, in which the contracting authority, in the public procurement procedure, may limit the use of subcontractors: this can only be done if the contracting authority has stipulated in the tender notice (tender documentation) that certain "essential tasks" should be carried out by the tenderer himself [see Sections 65. § (10) and 138. § (3)]; here, the involvement of subcontractors is, in principle, possible, but with certain restrictions imposed by the contracting authority.

According to the general principles of contract drafting, the contracts contain the relevant legal provisions in the form of references – however, in many cases, the public procurement rules reviewed above need to be shown in the contract in detail, in order to clearly define the relevant tasks of the contracting parties.

3. Advantages-disadvantages

In the case of more complex projects – with special view the fact that specialization in the construction industry is becoming more and more wide-spread – the contractor, in many cases, will necessarily use a subcontractor, or otherwise he would not be able to perform the given service or part of the work himself. At the same time, the involvement of subcontractors does not adversely affect the customer either, as the customer will continue to have one legal relationship only (with the main contractor responsible for the execution of the works) and thus the customer can enforce the liabilities toward the subcontractor at the main contractor. This solution is therefore in fact beneficial to everyone and, as it is clear from the above provisions, also allows the parties to limit or exclude subcontractors from their performance in accordance with their business interests. It should also be noted that the position of subcontractors is strengthened and their rights to an entrepreneurial fee are better protected by warranty provisions than before [e.g. Act Épkiv., Sections 33.§ (5)-(6)].

4. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:104.§, 6:129.§, 6:148.§;
Act CXLIII of 2015 on Public Procurement, Sections 25.§, 36.§, 32-63.§, 65.§, 67.§, 138.§;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Sections 3.§. 17-21.§, 33.§.

The acceptance procedure

1. Concept and characteristics

The acceptance procedure is an action serving the purpose of the technical inspection of the proper execution of a construction work, and of the closure of the financial settlement between the client and the main contractor, during which:
- the technical completeness of the completed work is checked by the client and the main contractor;
- a list of defects is taken; the repair of the defects preventing proper use, enlisted in this document, is a condition for the closure of the technical acceptance procedure.

Following the acceptance procedure, a full financial settlement will take place between the parties, including also extra work and any performance guarantees.

As a result of the acceptance procedure, and after the payment of the balance of the final invoice, the main contractor will hand over the workspace and the acceptance documentation to the client.

The rules of the acceptance procedure are governed by Ptk. (the Civil Code) on the one hand, and Épkiv. (construction works act) on the other hand. The rules of Civil Code allow for deviation (dispositive rules), so the parties may deviate therefrom in the contract, while the rules of Épkiv. are cogent, so it is not possible to deviate validly therefrom in the contract.

The Civil Code sets out that, during the acceptance procedure, the parties shall perform the checks and tests commonplace in the given sector, which are deemed necessary to verify whether performance is in conformity with the contract; so, if no special provisions had been set out, the parties then need to use basically this as a starting point.

The acceptance procedure is perhaps the most risky act of a general construction contract, as clients strive for going beyond the obligations set out by the Hungarian laws and the established professional practices, and try to enforce conditions against a main contractor that significantly exceed the obligations set out by law for main contractors. With this in mind, we draw your attention to the following:

a) It is often the case that clients require complete faultlessness to commence the acceptance procedure, even though the Civil Code states that the acceptance shall not be refused on the grounds of any defect in the works that, in the event of repair or replacement, does not prevent proper use. The parties may, however, derogate from this provision, but it is not fair e.g. in a general construction process for the customer to be able to refuse the taking over due to minor errors.
b) If a technical content that is not regulated by the current Hungarian Standard MSZ (MSZ EN) is also part of the contract, it is recommended to lay down the minimum requirements of such technical content in the descriptive part of the technical specifications (e.g. the quality requirements for the surface of an industrial flooring), so that it should not be disputable during the acceptance procedure.
c) Precise regulation of the conditions for the commencement of the acceptance procedure is required in the contract, because under the legislation in force, the contractor shall be deemed to have performed in due time if the procedure of acceptance begins within the contracted delivery

period, therefore the procedure does not have to be completed by this date.

d) The duration of the acceptance procedure is basically 30 days according to the legislation in force, but it is recommended to specify the process of the procedure in more detail than the legislation, because, regrettably, it is an established practice that clients prevent the completion of the acceptance procedure by repeatedly producing new and new lists of faults – that occur in some cases in the normal use of certain parts of the installation. To avoid this situation, we recommend that the contract clearly state that:
    i) The Parties shall, after the commencement of the acceptance procedure, take one list of defects, in which time limits shall be set for each fault and precise sums shall be fixed for the remedying of defects, because it may happen that the main contractor cannot remedy certain defects due to weather conditions (e.g. in garden architecture), but at the same time a lack of remedying such defects should not prevent the completion of the takeover of a large installation. If the parties allocate specific amounts for each defect, it will assist in the settlement of accounts in the event of a subsequent downgrade of prices..
    ii) it is also recommended to lay down that the acceptance procedure can be closed down if the defects, indicated in the list, that prevent the intended use of the installation are remedied. It is therefore advisable to indicate in the list of defects already, which of the defects are considered by the parties as defects that prevent the intended use.
e) We consider it important to state that obtaining the permit for the use of the facilities is not the responsibility of the main contractor in accordance with the legislation in force, so we recommend that the main contractors should under no conditions undertake the acquisition of the permit for use until the expiry of the final deadline, in particular because the condition of initiating the procedure at the authorities is the closure of the e-diary and of the acceptance procedure. However, if after all the main contractor decides to undertake the administration of the permit for use within the framework of the main contract, we strongly recommend to set it down clearly that the main contractor cannot undertake a deadline with result-responsibility for obtaining the permit for use, as the issue of the permit depends on a number of circumstances independent from the main contractor (e.g. the conclusion of utilities contracts with service providers, the payment of public-utility development contributions, possible co-contractor's transfer and acceptance procedures, the closing of their e-diaries -- are all circumstances outside the main contractor's interest). It is also risky to undertake the obtaining of the final (effective) permit for use, as the entrepreneur hardly has any influence over the becoming of effective of the decision. The main contractor holds a number of documents that are needed to start the procedure for permitting the use of the facility (such as waste record sheets, responsible technical manager’s statement, measurement records), which must be handed over under the applicable laws after the main contractor's final invoice has been paid. We recommend that main contractors should highly insists on enforcing this right of them existing under this law (see also our entry herein on the Final Account).;

f) We draw also the attention to the fact that, under the rules of the Civil Code, it is not possible to enforce a claim both for a penalty for lack of conformity and for a warranty. As to the main rule, on the basis of warranty rights, the customer may ask for repair, or replacement, or a reduction in the price, and in this case, no penalty may be claimed at the same time.

g) It is also important to be aware that the provision -- developed and applied by the practice -- has also been included in the new Civil Code, which states that if the customer fails to carry out the procedure of acceptance or verification, the legal effects of performance shall take effect upon the actual transfer of possession. In other words, if the customer does not carry out the acceptance procedure -- presumably in bad faith -- but actually takes possession of and uses the facility, then it qualifies as being taken over in respect of all legal consequences – i.e. the final bill also becomes due, the guarantee period starts, etc.

h) The performance of the contract is basically completed with the acceptance, and therefore the main contractor claims the final part of his entrepreneurial fee in the final account; therefore, in the final certification of performance that constitutes the basis for the final invoice, the parties must settle all claims, including, inter alia, the following:

   i) it is recommended to agree on all claims for extra work by the main contractor;

   ii) it is necessary to record all possible claims for penalties and for compensation, as well as the lack of such claims;

   iii) it is necessary to record the starting date of the main contractor's guarantee and warranty obligations, which is typically the date of the closing of the acceptance procedure;

   iv) it is necessary to record the date of the payment of any performance-related financial retentions if any, as well as the date of returning the insurance performance bond / bank guarantee

It is recommended that the above be defined as minimum ingredients for the final performance certificate, by stipulating that the further content thereof should be agreed upon by the parties and be based on the characteristics of the construction project.

2. Advantages-disadvantages

The acceptance procedure is of great importance in the case of a construction contract, as it takes place during the acceptance procedure that the parties check whether the performance of the contractor was in all respects compliant with the contract; the payment of the entrepreneurial fee is also subject to this procedure. For this reason, the legislative rules applicable to the implementation of works in the construction industry contain several provisions that protect the legitimate interests of the parties in this procedure. The right, for instance, due to the contractor pursuant to the Épkiv. Act (act on the implementation of works in the construction industry) to detain the work site until his invoice gets settled can be considered as such, and the process of the TSzSz (Organization of Experts for the Certification of Performance) is also aimed at a smoother handling of such disputes. The latter organization gives expert opinion (under an assignment of the authorized parties), if the performance certificate has not been issued, its issue is disputed or the performance certificate has been issued but the payment has not been made (see also the entry herein on the Organization of Experts for the Certification of Performance).

With view to the fact that, in the course of the implementation of works, there is typically a chain of entrepreneurs made from several actors, one of the decisions of the Arbitration Court organized alongside the Hungarian Chamber of Commerce and Industry may be a guideline for such situations, stating that if the customer has taken over the work from the main contractor, and has acknowledged its acceptance for the whole part of the subcontractor's contract part, in this case the main contractor may not refuse to accept the subcontractor's work (Decision No. 1999/7. of the Arbitration Court). In such cases therefore, the subcontractor shall also have grounds to claim the acceptance of his performance and may enforce its legal consequences..

3. Relevant major pieces of legislation

Act V. of 2013 on the Civil Code, Sections 6:159.§, 6:187.§, 6:247.§;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Section 33.§.

Judicial/arbitration clause

1. Concept and characteristics

If a dispute arises between the parties in connection with a construction contract that cannot be resolved amicably, the parties may enforce their rights by way of a judicial process. The Civil Code states expressly that unless otherwise provided for by law, the rights afforded in that Act may be enforced by way of judicial process. Within this framework, the parties may stipulate already in the contract which court to proceed in any subsequent dispute between them. The parties may refer their disputes either to a so-called ordinary court or to a court of arbitration.

2. Ordinary court

If the parties wish to stipulate an ordinary (state) court in their contract, they may, in the event of a dispute concerning property rights, or in the event of a future dispute arising from their specific legal relationship -- unless otherwise provided for by law -- stipulate the jurisdiction of a certain court. The stipulated court will have exclusive jurisdiction -- unless otherwise provided for by law or unless otherwise agreed by the parties.

However, we would like to draw your attention to the fact that the parties may still not stipulate the following courts to be competent as regards property law matters:

a) the Budapest-Capital Court of Justice (Fővárosi Törvényszék) and the Budapest Environs Court of Justice (Budapest Környéki Törvényszék) in matters falling within the competence of the courts of justice, and

(b) the Central District Court of Pest (Pesti Központi Kerületi Bíróság) in matters falling within the competence of district courts.

Such an agreement between the parties will therefore be invalid in a given case.

In the absence of a clause on competence, the dispute will be heard by a court being competent under the general rules on competence.

It should be noted that, in the case of civil law contracts relating to national assets in the territory enclosed by the border of Hungary, the competence of the Hungarian courts only may be stipulated -- this alone, however, does not prohibit the use of the court of arbitration referred to in point 3 below.

3. Arbitration court

In arbitral proceedings, not a state court but an arbitration court appointed by the parties decides on the disputes between the parties. Two types of the arbitration court are possible: ad-hoc or permanent, the latter one today is the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry.

Arbitration proceedings may be used in place of state court proceedings if the parties so agree. However, there is no place for arbitration in the event of a dispute arising from a consumer contract (or in cases other than those specified by law that are not relevant to construction work).

The parties must agree on the stipulation of the arbitration court in a contract,

in which all or any of the specific disputes that have arisen or will be arising in the future from their specific legal relationship -- whether contracted or non-contractual -- are subjected to arbitration. An arbitration contract may be part of another contract or an independent contract. However, the arbitration contract must always be in writing.

An arbitration contract must be construed as an arbitration contract made in writing if one of the parties, in a statement or in his statement of claim to be referred to an arbitration court, alleges the existence of an arbitration agreement, and it is not refuted by the other party – in other words, if although the parties have not provided for this issue in the contract in writing, but neither party objects to the arbitration proceedings.

If a foreign party is also involved in the contract in question, the parties should also provide for the language of the proceedings in the arbitration clause. In addition, when the contractual provisions are determined, it is advisable to ensure that the language of the contract, as well as the language of the law applicable in the event of a dispute should be in accord with the language of the court stipulated by the parties.

It is also possible to stipulate for arbitration courts based in foreign countries if it is the intention of the parties.

4. Advantages-disadvantages

It is important that the parties should be aware of the substantial differences between the two types of court ways. Arbitration proceedings are more costly, but typically faster than ordinary court proceedings. In the proceedings of the state court, a legal remedy can be started against the judgment, but against the arbitration award there is no appeal. Arbitration judgments can only be revised by way of ordinary court, in special cases only, by way of legal proceedings started for the annulment of an arbitration award.

Due to the above, typically in the case of higher value construction contracts, or in the case of foreign contracting parties, it may be more appropriate to use arbitration. When using an ordinary court, make sure that you do not agree upon a court whose jurisdiction cannot be provided for (e.g. PKKB = Central District Court of Pest = Pesti Központi Kerületi Bíróság).

5. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Section 1:6.§;
Act LX of 2017 on arbitration, Sections 1.§ (3), 8.§, 47.§ (1);
Act CXXX of 2016 on the code of civil procedure, Section 27.§;
Act CXCVI of 2011 on the national assets, Section 17.§ (3).

Securities, guarantees

1. Concept and characteristics

The legal institutions and guarantees listed below are basically designed to push the parties to fulfil their contractual obligations and, where appropriate, to facilitate the enforcement of claims against each other. The most common securities used in practice in association with construction works are summarized below:

1.1. From a formal point of view

- - a guarantee or a first-loss (surety) guarantee undertaken by a financial institution or insurance company, or a guarantee letter issued by the parent company,
- - a bond issued pursuant to an insurance contract, including a first-loss guarantee,
- - deposit / transfer to the account of the creditor as a collateral security,
- - withholding from the entrepreneur's accounts.

1.2. From the point of view of content - that is, depending on what kind of claim is covered by the given security:

- tender guarantee
- performance guarantee
- good-performance guarantee
- advance-repayment guarantee.

2. The characteristics of securities

In the context of a balanced contractual relationship between undertakings, the parties stipulate the securities listed above in their contracts, in order to enforce and secure their rights. A part of the legal provisions pertaining to securities is contained in the Civil Code, but many institutions are regulated in greater details by the Kbt. (Public Procurement Act), however, the rules of the latter act are mandatory obviously in those proceedings that are subject to the given act. In other cases, it is in the parties' freedom of contract what kind of securities they stipulate against each other.

When applying the securities, it is desirable that they be bound to targets, their amount and extent should not impose a disproportionate burden on the party providing the security (e.g. if a bank guarantee covers several years of construction works, it is advisable to align its amount with the schedule of payments and to reduce it in proportion with the already paid fee, etc.).

For the same reason, it is also appropriate that a security should be maintained only until it is justified by the legitimate interests of the party concerned (e.g. a security for good performance should not be maintained for months after the expiry of the contractual guarantee period, since claims announced in time during the contractual guarantee period can not be enforced even in courts beyond the 3-months period after the expiry of the contractual guarantee period.

The aim to be realized in the scope of securities is that all forms of securities should be accepted by private customers too, including also the surety (first-loss guarantee) bond issued under a contract of insurance and introduced the Kbt. Thus, if an enterprise's bank guarantee framework is getting exhausted, it can use -- albeit at somewhat higher expenses – the increasingly popular surety (first-loss guarantee) bond issued under a contract of insurance.

It is advisable to agree on a reduction in the amount of the securities during the contractual period, if the advance sum provided in connection with the performance of the contract is settled not in one amount at the submission of the final invoice.

It is also a good practice when the security provided by one party (e.g. a performance security) is converted into a contractual-guarantee security at the end of the performance period, for securing the contractual-guarantee claims, and it is also a good practice if the party has the opportunity to switch between the possible forms of security -- without compromising the customer’s interests, so as to be able to manage, as freely as possible, the security frameworks being at its disposal.

3. Advantages-disadvantages

The performance guarantees in the contract may serve the interests of either party; e.g. the good-performance guarantee serves the customer’s interests, while the contractor’s interests are served by a bank guarantee undertaken by the customer's bank for the payment of his fee, or by a guarantee letter from the parent company. Under a guarantee, the eligible party can enforce its claims against the other party more easily, faster, or more likely. However, guarantees too much in amount or being maintained for an unproportionately long period of time may bring about a disproportionately high cost for the party required to provide it.

4. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Section 5:95.§ 6:416-438.§;
Act CXLIII of 2015 on public procurement, Sections 54.§, 134.§.;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Section 3.§ (2) o).

The advance

1. Concept and characteristics

The advance is not explicitly defined by the Civil Code, but its definition can be deduced from the VAT Act. According to this, in the case of the sales of products or the provision of services, the advance is defined as a property benefit provided prior to the performance, that can be offset in the consideration amount.

The primary purpose of the advance is to facilitate the financing of the project by the entrepreneur and at the same time, it reduces the financial risk of the entrepreneur as well. The advance is basically part of the purchase price or of the contractors' fee, and it should be counted into this price or fee in any case, and no special legal consequences are attached to it -- as opposed to the earnest money. The Épkiv. Act, Section 3 (2), stipulates that if the client provides advance payments to the main contractor, the determination of the use of the advance, as well as the method of the settlement of the advance shall be recorded in the construction contract.

The settlement of advance may be effected on the basis of an agreement between the parties, either in each interim invoice in proportion to the performance, or in a lump sum in the final invoice. The following may serve as a guarantee for the contractual settlement of the advance: a bank guarantee or a bond issued pursuant to an insurance contract, including a first-loss guarantee.

Therefore, if the customer provides a smaller amount as an advance, it is not absolutely necessary and justified to provide for a security for the repayment of the advance in the contract.

Please note that if the advance is settled in the final invoice, the advance will also serve as a payment security, in addition to its financing function. On the other hand, if the advance is settled continuously, in proportion with the performance, it is appropriate that the amount of the advance repayment security can be reduced proportionally to the settlement of the advance.

We also recommend that the customer should accept not only a bank guarantee as an advance repayment security, but also an insurer's bond as an alternative.

2. Advantages-disadvantages

The payment of an advance obviously brings the entrepreneur into a more favourable financial situation, as he does not have to finance the entire costs of the construction works, as a part of such costs is paid by the customer in advance. And if the parties agree appropriately in the way the advance should be settled, and if they stipulate a security for the repayment of the advance, then the customer's interests will also be adequately secured.

3. Relevant major pieces of legislation

Act CXXVII of 2007 on VAT, Section 59.§ (1);

Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Section 3.§ (2) n).

Payment securities

1. Concept and characteristics

The performance of construction contracts is typically based on the mechanism that, necessarily, the contractor is always the first in the order of performance, therefore he has to pay an increased attention to making sure that the client has got the financial resources needed for the construction and, if the client does not have the necessary resources needed for the construction, the contractor should have the opportunity to suspend the performance as soon as possible and to keep the building site in his possession.

In the market of private investments, the above recommendations are ensured by the means available through the legal statutes, while ÉVOSZ herein wishes to recommend some practical contractual terms to building contractors:

2. Payment securities stipulated by law for the contractor of the construction works

2.1. The client must have the consideration amount of the construction activity

Pursuant to the Épkiv. Decree, the client is obliged to declare that he has got the value of the construction works, i.e. the contractor can enter into a construction contract only if the full financial resources necessary for the execution of the contract are already available upon signing the contract. However, the fulfilment of this basic condition must be verified in many cases, since no legal effect is attached this legal statement in itself, and thus the client's willingness or ability to pay will not become better either.

2.2. Collateral manager

The operation of the collateral manager is regulated by the Épkiv. Decree. The use of a collateral manager is mandatory, if the value of the construction works activity reaches or exceeds the community limit value under the Kbt. (PP) Act (in year 2018 it was EUR 5,548,000 or HUF 1,723,541,680, the extent of which is determined by the National Budget Act) if the project is not subject to the Kbt. (PP) Act (private investments).

On the one hand, the collateral manager makes it possible for the contractor to make sure that the client has the consideration money at his disposal for the construction works, and he is entitled to suspend the performance in case of a lack of the consideration, and he also ensures the checking of the use of the performance guarantee provided by the building contractor:

- **i)** the client must prove that he has at his disposal the full value of the construction works;
- **ii)** he is required to deposit the consideration value of the coming construction works phase in the account of the collateral manager up to the first day of the construction works phase in question;
- **iii)** if the client fails to deposit the amounts allocated in the financial schedule for the given construction works phases until the commencement date of the performance phases specified in the contract, the building contractor shall be entitled to suspend the performance for 30 days, and thereafter

shall be entitled to terminate the main contract or to extend the performance time limit with the length of the suspension period, along with a payment of his related costs by the client.

2.3. The options of withholding the taking-over documentation and the construction site, as well as the denial of the closing of the e-building log

Pursuant to the Épkiv. Decree, Sections 33. § (1) and (3), the building contractor is entitled to hold the work site in his possession, to refuse the closing of the e-building log, and to bound the handover the acceptance documentation to the pay-out of the final invoice.

The building contractor may withhold the following documents until the pay-out of the final invoice:

a) the waste record sheet,
b) the as-built drawings/documentation,
c) the operating and maintenance instructions;
d) any other official permits, documents or declarations that are required for the purposes of obtaining a permit for or an acknowledgement of the entry into service;
e) guarantee documents, operating instructions for the main movable building structures and other instructions for use, operation and maintenance, the pressure test reports
f) the test reports and protocols for the function tests carried out,
g) the qualification document made on the result of the first revision of the electrical equipment,
h) the guarantee documents for built-in fittings, equipment, finishes, and other accessories,
i) the guarantee documents and authentication records for public utility meters,
j) the health and safety plan of the building.

We would like to point out that, in practice, by way of the provisions set out in the contract, the client tries to bring forward the handing over of the documents in the contract, as a major part of the above documents, as well as the closing of the e-log is essential for obtaining the occupancy permit of the building (e.g. by making sure that documentation is handed over upon each interim invoicing, by making the closing of the e-log subject to penalty). We would like to draw the attention of the building contractors to the fact that the provisions of the Épkiv. Decree are cogent, which means that no valid deviation from those provisions is possible not even in a construction contract. (See also the entries herein on the Final invoice and the Securities, guarantees.)

2.4. Suspension

In addition to the above, the Civil Code provides for the possibility of suspension in general (not only for construction contracts) if the customer commits a breach of contract (e.g. late payment).

3. Payment securities proposed for incorporation in construction contracts

In addition to the above, a number of payment securities are available to building contractors that are not directly based on statutory provisions, but can be deducted from the customer's obligations set out by statutory provisions, and whose application is recommended by ÉVOSZ to building contractors in order to appropriately ensure the payments to themselves and to their subcontractors.

3.1. Advance, as a payment security

The advance serves on the one hand the pre-financing of the building contractor, while on the other hand it can also serve as a payment security. In order to ensure that the advance should function also as a payment security, we recommend that the amount of the advance be withdrawn in full or in as large part as possible from the amount of the building contractor's final account. As no provision of law exists for the amount of the withdrawal of the advance, the order of withdrawal of the advance depends on the agreement of the parties and it must be stated in the construction contract. (For more details, see the Advance entry herein.)

3.2. Making certain that the client has the consideration amount of the construction activity throughout the entire construction period

Pursuant to the provisions of the Épkiv. Decree, the client must declare that he has got the consideration value of the construction activity, but the Épkiv. does not provide opportunity for making sure its availability to the building contractor. In the case of contracts subject to clients' collateral management, the availability of the client's resources must be checked by the collateral manager, however, the clients' collateral management is compulsory only in case of works of higher amounts (see above).

Due to the aforesaid, ÉVOSZ recommends to building contractors that, by referring to Épkiv. Section 3 § (1) (m), they should require to lay down detailed rules in the construction contracts, in order to ensure that the building contractor should be able to continuously ascertain whether the consideration amount of the subsequent performance phase is at the disposal of the client. Perhaps the most effective regulation of this is (if the contractor's rights are not protected by a bank guarantee that guarantees that the client pays) that the client must verify with a bank account statement before the commencement of the given construction phase (most often a month) that the consideration value of the construction is available on his bank account, as well he must declare in writing that he manages these funds separately and that he will use it only to pay the building contractor's fee. In the absence of proof of the availability of funds, we recommend that the building contractor should stipulate a right to the suspension of the performance of work -- although he has the right to do so under the Civil Code too.

3.3. The option of suspending the works

The former Civil Code (Act IV of 1959 on the Civil Code) regulated slightly more specifically the possibilities of suspending performance in the event of late payment by the client or in the event of a negative change in the client's property. The Civil Code (Ptk.) currently in force regulates this situation more generally and leaves it to the parties to elaborate the detailed rules

With view to the aforesaid, ÉVOSZ recommends to building contractors to specify in detail the rules for the suspension of the performance of work, should the customer be late with its payment or with its delivery of the certification of performance. ÉVOSZ recommends to lay down the following rules in the construction contract:

- If the client is late (e.g. by 5 business days) with the fulfilment of any of his payment obligations, or with the delivery of the certification of performance, the building contractor shall be entitled to suspend the work and, from that time on, to carry out only the work necessary to preserving the condition of the works, and to ensure the security and guarding of the building site;

- - In order to avoid misunderstandings, it may also be appropriate to state that the building contractor shall remain legally in the possession of the construction site during the period of suspension;
- If an agreement is reached between the parties on the legal consequences of the breach (delay) or the delayed entrepreneurial fee has been paid, then the building contractor must start the work within 3 (three) working days;
- The parties will undertake to update the technical schedule with the period that elapsed from the suspension to the commencement of work, i.e. they will extend the performance time limits proportionally;
  In the absence of an agreement between the parties, the building contractor shall be entitled to terminate the contract and the parties shall settle the works already carried out and the base materials already purchased by the contractor (within 30 days). In this case, the imposition of a cancellation penalty may also be justified, by taking the value of the unrealized work as the basis of the penalty. (See also the entry on Penalty herein)

4. Advantages-disadvantages

Payment securities in the contract promote the obligor's ability or willingness to pay. The aforementioned institutions primarily serve the purpose of ensuring that the contractor can ascertain whether the collateral is available to the customer, and to enforce him to fulfil his payment obligations in a case where there is no legal basis for refusing payment. In cases where the contractor wants to secure the customer's ability to pay, it is advisable to stipulate bank guarantees, suretyship, etc. in the contract (see the entry herein on Bank guarantees, guarantees).

5. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Section 6:139.§.
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Sections 3.§, 18.§, 33.§.

Payment and invoicing rules

1. Concept and characteristics

The interests of the parties obviously require it, and therefore, Épkiv. also stipulates that the parties must specify in the construction contract the form and method of the settlement, and the method and deadline of payment in addition to stating the sum of the contractor's fee. However, in addition to these contractual provisions, this question is regulated also by legal provisions in order to ensure a balanced contractual relationship between the parties.

2. Rules in public procurement

The order of issuing certificates of performance related to public procurement is set out in the Kbt. (Public Procurement) Act, Sections 135.§ (1) and (2), as follows:

„135. § (1) The party entering into the contract as contracting authority shall make a written declaration on acknowledgement of the performance of the contract (receipt of performance) or on the refusal of such acknowledgement, unless otherwise stipulated by law, within 15 days from the date of the performance by the party entering into the contract as tenderer or of the receipt of the written notification thereof.

(2) In case of a public works contract the party entering into the contract as contracting authority shall issue a receipt of performance upon the request of the party entering into the contract as tenderer, if the contracting authority does not start the delivery procedure upon the written notice (completion notice) of the party entering into the contract as tenderer within 15 days following the deadline defined in the contract as the deadline for starting the delivery procedure, or if they start in time but does not finish with it until the deadline defined in the contract, under the Civil Code (Ptk.), Section 6:247. § (2).”

In connection with construction works, Government Decree 322/2015. (X. 30.) contains the following essential provisions:

- The payment of the consideration may be made only after the performance certificate pertaining to the given work or work part has been issued.
- In the event of contracts providing for a net performance period of more than six months and at the same time containing a net consideration amount of more than fifty million forints, the contracting authority shall provide for the opportunity of interim invoicing at intervals or stages of execution, appropriate for the characteristics of the specific construction works project.
- Special rules apply when a party entering into a contract as a tenderer uses subcontractor(s) for the performance, in which case the payment of unpaid fees due to subcontractors takes priority, and it is a prerequisite for the payment of the fee due to the main contractor.

3. Major rules under the VAT Act

In determining the contractor's fee, special attention should be paid to the terms and conditions of the so-called reverse taxation in accordance with Act CXXVII of 2007 on VAT, Section 142 (1) (b). This provision says that VAT shall be paid by

the taxable person acquiring the goods or services (that is, by the customer) *"in connection with construction and other similar works, which are treated as services supplied for the purpose of building, expansion, remodelling and any other form of alteration of a property, including where a property is terminated by demolition, provided that the construction, expansion, remodelling and any other form of alteration of the property is subject to authorization by the competent building authority, of which the customer shall supply a statement in advance and in writing to the supplier of the service".*

In connection with the invoicing, all other provisions applicable to invoicing, required by accounting and tax legislation should be taken into account, of course.

On the basis of the above, it is absolutely necessary to clearly state the deadline for issuing the certificate of performance in the contracts.

4. Payment term according to the Civil Code

It is also important to know that if the parties did not fix the time of payment in the contract, the monetary claim shall be satisfied within thirty days of receipt of the creditor's request for payment or that of the invoice. A monetary claim shall be satisfied within thirty days after the creditor's contractual performance:

„a) if the creditor's request for payment or invoice was received before the creditor's contractual performance (or the procedure of acceptance or verification in the case of works contracts);

b) where the date of receipt of the creditor's invoice or request for payment cannot be clearly determined; or

c) where the debtor is required to make payment before the time of receipt of the creditor's invoice or request for payment."

In contracts between business parties, the above-mentioned time for payment exceeding 30 days may be contested by the creditor if that was determined unilaterally and unjustifiably unfair to the creditor contrary to the requirements of good faith and fair dealing. Where the period fixed in the contract for payment of a monetary claim exceeds sixty days, unless proved otherwise it shall be deemed contrary to good faith and fair dealing and shall be regarded as unilaterally and unjustifiably unfair to the creditor.

If the debtor is an authority and the creditor is an enterprise, then the rules are somewhat different, as a payment period of more than 30 days can only be made if the parties have agreed in the contract on a deferred payment of the cash, provided that this is factually due justified, but the time required to settle the cash deposit may not exceed 60 days in this case. Payment periods longer than 60 days are basically null and void for more than sixty days

5. Advantages-disadvantages

In all cases, it is appropriate for the parties to agree on the terms and conditions applicable to the performance certificate and the payment of the invoices – within the framework of the relevant statutory regulations.
If the performance certificate is not issued, and it is disputed by one of the parties, it is recommended to request the opinion of the Performance Certificate Expert Body attached to the Hungarian Chamber of Commerce and Industry. Detailed rules for this procedure can be found in the entry herein: Performance Certificate Expert Body.

6. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Section 6:130.§, 6:247.§;
Act CXXVII of 2007 on VAT, Section 142.§;
Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects, Sections 30.§-32/A.§.

Impact of changes in legislation on construction contracts

1. Concept and characteristics

Nowadays it can be said that the legislator quite often creates or modifies legislation that regulates, in general or in detail, a significant area of life, the follow-up of which requires a high degree of up-to-dateness from those who apply the law, i.e. from the citizens and economic organizations for whom a given law contains provision.

This is also the case in the field of construction, where a number of new laws and amendments have recently come into effect (e.g. Government Decree 312/2012. (XI.8.) on the official procedures and controls for construction and construction-supervision, and on construction authority services, Government Decree 155/2016. (VI. 13.) on the simple announcement of the construction of a residential building, etc.), with the legislator's intention to comprehensively reform the sector.

The frequent changes in the law also in the construction industry, therefore, present particularly high challenges to businesses, especially to those that do not have the appropriate legal apparatus to keep track of the changes in an up-to-date manner. These entrepreneurs are often confronted with changes in the law only when the customer puts forward a draft contract for implementation, which already contains the change. ÉVOSZ recommends that if the entrepreneur does not have the necessary legal apparatus, he should use the help and information materials offered by the professional chambers and interest-protection organizations, which not only communicate the changes in the law, but also provide a clear explanation for them.

Due to the above-mentioned changes in the law, in practice it happens in numerous cases that some of the provisions applicable to the contract is changed in the period between the signing of a contract for a long-term construction work and the completion of the performance, or during the warranty period stipulated in the contract.

The prohibition of retroactive application of the law can also be found in the judicial practice of the Constitutional Court and in the Act on legislation (hereinafter Jat.). The latter declares that: *'A law may not impose an obligation before the date of its entry into force, may not render it more burdensome or withdraw or restrict a right and shall not declare a conduct unlawful.*'

The prohibition of retroactive application of the law also appears in the clause Regulatory Transition of Jat., where the law provides guidance on which of the laws are applicable: the one that comes into force or the one, which expires. Jat. 15.§ (1) states that: "*A statutory provision -- unless otherwise provided by law -- shall be applied*

(a) to facts and legal relationships arising after its entry into force, and

(b) to procedural actions commenced after its entry into force."

In the context of the above, the law also states that:
“A statutory provision -- unless otherwise provided by law – shall be applied
(a) to facts and legal relationships arising during its effective period, and;
(b) to procedural actions commenced during its effective period
also after the expiry of the effect of the legislative provision."

It follows therefore from the provision of the above-mentioned law that if, for example, a construction contract was concluded between the parties on 15 February 2014, and its the performance deadline was 1 May 2015, then the legal relationship between the parties will be governed by the old Civil Code (Act IV of 1959) in the course of the entire performance, even if, in the meantime, the new Civil Code (Act V of 2013) entered into force on 15 March 2014. Thus, in the given case, the old Civil Code will be applicable also to a warranty issue arising in 2015, and the special warranty rule introduced by the new Civil Code for real estates will not be applicable. At the same time, it is also important to see that the procedural laws and regulations will be applicable to the parties in all cases where the procedural action itself is commenced by the parties after the entry into force of the amended law.

Given that the legislative changes occurring after the conclusion of the contract are objective circumstances to which the parties have no influence whatsoever, but which may impose additional burdens or obligations on one of the parties, it is advisable to settle in the contract that if, under the scope of the contract, there will be a change in legislation, which will impose additional obligations on the parties, or withdraw their rights, the consequences and extra costs thereof shall not be part of the contract, and the parties must agree thereon separately. It should be noted that these additional costs -- if they are strictly related to the execution of works (e.g. stricter energy requirements) -- should typically be borne by the customer, since the contract itself is created for the customer’s benefit. On the other hand, the costs that have an impact rather on the contractor’s own operations (e.g. stricter occupational safety rules, new data protection provisions) should be borne by the contractor -- however, the settlement of these issues is obviously subject to the contractual agreement of the parties.

2. Advantages-disadvantages

Since the parties are not able to limit or exclude any uncertainty or risk arising from future changes in the law, it is strongly recommended to settle in the contract beforehand the issue of bearing the costs arising from such cases, or to agree that if such a situation occurs, then the parties will agree on these costs on a case-by-case basis.

Therefore, ÉVOSZ recommends that in such a case, the contractor should in any case initiate a consultation with the customer. The contractor cannot be expected to calculate, before signing the contract, with unforeseeable costs arising from a possible change in the law during the performance of the contract -- although it is obviously expected that the contractor should calculate, already in his tender, with such provisions of law that have already been approved, promulgated, but being not yet in force..

3. Relevant major pieces of legislation

Act CXXX of 2010 on legislation, Sections 2.§, 15.§;
Government Decree 312/2012. (XI.8.) on the official procedures and controls for construction and construction-supervision, and on construction authority services,
Government Decree 155/2016. (VI. 13.) on the simple announcement of the construction of a residential building.

Insurances related to construction

1. Concept and characteristics

With view to the fact that the construction design- and construction works activity involves many potential risks, the parties can agree or, in some cases, the legislator prescribes to the contractor to enter into or to maintain certain insurance policies or contracts. These insurances are typically the following:

2. Typical insurances in the construction industry

2.1. Designers and contractors liability insurance

In cases covered by the Public Procurement Act, and pursuant to Government Decree 322/2015. (X. 30.), in the event of ordering of design and engineering services and, in the case of construction works, the tenderer shall, at the latest by the time of the conclusion of the contract, enter into a liability insurance contract or extend the existing liability insurance to the extent required by the contracting authority in the notice initiating the procedure or in the public procurement documents.

2.2. Compulsory insurance for residential buildings affected by the notification

In the meaning of Government Decree 155/2016. (VI. 13.), for residential buildings affected by the notification,

a) the architect or other professional designer who is in direct contractual relationship with the client shall enter into a liability insurance and maintain such insurance for the time limit as specified in the Decree, for the compensation of damage caused in the scope of the design and engineering activity undertaken by him;

b) the main building contractor shall enter into a liability insurance and maintain such insurance for the time limit as specified in the Decree, for the compensation of damage caused in the scope of the construction works activity undertaken by him.

The designer must possess the liability insurance at the latest at the time of the conclusion of the design contract, while the main building contractor must possess the liability insurance at the latest at the time when the work site is handed over.

The liability insurance must provide cover for material and personal damage occurring in the scope of the insured activity.

The designers' liability insurance must cover for the damage caused by the design work done by the designer and its subcontractor, and for the damage caused by the designer's technical supervision work done by the designer or any other designer employed by him in any form of legal relationship.

The main building contractor's liability insurance must cover the material damage caused by a noncompliant construction activity of the residential building affected by the construction works of the main building contractor and his subcontractors, the damage to third parties caused by the main building contractor

and his subcontractors, and the damage caused by the responsible technical manager employed by him in any legal relationship, occurring during the time period the liability insurance contract is in effect.

In the event of the aforementioned insurances, the liability insurance must provide cover in at least the amount specified in the Decree for these insurance policies.

The liability insurance must provide cover for damage caused during the time period the liability insurance contract is in effect, and for damage that occurs within 3 years after the termination of the contract the latest, reported to the insurer, and that qualifies as an insurance event.

The insurance coverage certificate must also be uploaded in to the electronic construction log.

2.3. Other insurances

In addition to the insurance contracts to be concluded on the basis of the statutory obligation related to the above-mentioned construction activity, the parties may of course agree to conclude other insurances as well within the framework of contractual freedom. The parties often agree that the contractor is obliged to conclude full contractors' all-risk insurance (CAR) and liability insurance covering also the subcontractors, and maintain it for the entire duration of the contract. Typically, the contractor is obliged to hand over the cover certification on the insurance to the customer at the latest at the commencement of the execution of the construction works. In many cases the parties agree that the customer is indicated in the insurance as the beneficiary, that is, the insurance company will pay the insurance amount directly to him, if applicable.

3. Advantages-disadvantages

As we can see from the above, in many cases the conclusion of an insurance contract is a statutory obligation, but it is advisable to require such insurance from the contractor also when it is otherwise not obligatory, because it makes the position of the customer considerably easier, and it ensures that in case of an eventual damage event, the damages and costs incurred are indeed reimbursed. While insurance is obviously a cost to the contractor, it is advantageous for the contractor that an unexpected damage event does not make the existence of the company impossible, because the insurance company pays compensation for damages – occurred in the assets of the contractor or third party, or occurred in connection with a personal injury -- under the terms of the insurance contract.

4. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:439.§-474.§;
Government Decree 155/2016. (VI. 13.) on the simple announcement of the construction of a residential building;
Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects, Sections 11.§, 26.§;
Government Decree 155/2016. (VI. 13.) on the simple announcement of the construction of a residential building, Sections 6/A-6/E.§.

Procedural rules and documentation of cooperation meetings

1. Concept and characteristics

The definition of co-operation meetings is not provided for by law, such meetings have been developed by the practice. These meetings are, on the one hand, the arena of reconciliation of the parties involved in the performance, on the other hand, they are forums where the parties, occasionally, coordinate the actual issues of execution in the company of the designer, the customer, the manager of the project and the technical supervisor.

The co-operation meeting is usually held on a weekly basis during the implementation of the works, and usually the project manager leads the meeting and prepares the minutes.

In the course of the cooperation meetings, the parties involve the designer in the communication of the design in the frame of a designer's technical supervision, while the current status of the project, the obstacles, possible backlogs, additional and extra work needs are also communicated here.

The purpose of the co-operation is for the parties to record the current tasks, to identify problems and possible solutions, and to designate the persons responsible for the tasks, and the deadlines for performance/completion.

The purpose of the protocols recorded in the course of the co-operation is to give all participants an accurate, authentic view of the current situation and progress of the project during the execution, and to make the project traceable.

It is also important that the legal consequences of the agreements and decisions made at the co-operation meeting are clearly recorded. If the agreement involves an amendment of the existing agreement between the parties (e.g. in the case of ordering extra work), the parties shall ensure that the protocol agreement is entered into in a written contract amendment duly signed by authorized persons. In addition, it may be advisable to upload the cooperation protocols as an attachment to the e-construction log.

It is advisable to specify in the contract or in its annexes the dates on which the cooperation will be held so that all parties can adapt to it in advance.

The procedure and method of the invitation should be determined, and the need for the topic to be prepared in advance should be laid down, so that everyone can prepare and make the discussion effective. For the sake of efficiency, it is advisable to indicate in advance the need for the designer's participation and what issues will be discussed.

It is advisable to define the form of the protocol, so that everyone is easily informed when uses it. It should be sent to the participants in writing, shortly after the meeting, by allowing a short commentary, approval period before finalizing it, then it should be stored at a predetermined location and made it always accessible.

2. Advantages-disadvantages

An appropriately prepared co-operation meeting can effectively promote co-operation between the parties, and at the same time give the parties an opportunity to negotiate and resolve any disputed or unclear issues that arise during implementation.

Bills of quantities, priced bills of quantities

1. Concept and characteristics

According to (Épkiv.), the construction documentation is a single document that demonstrates, in a verifiable way, the fulfilment of the essential requirements and other specifications specified basically in the design program, including the drawings, technical specifications, information, performance declarations and instructions required for the realization of the structure, on the basis of which the planned construction can be realized in a practically and economically feasible way. In addition, the construction documentation must clearly define the characteristics prescribed in Épkiv of all materials, structures, products, and built-in equipment that become part of the structure.

The construction drawings, as part of the construction documentation, must be in compliance with the requirements set out for its content by Épkiv. in Annex 1. The work parts of the construction documentation shall be determined by the responsible designer taking into account the regulations of the Hungarian Chamber of Architects and the Hungarian Chamber of Engineers.

On the basis of the above authorization, Section 4.2 (within Section 4, defining the content requirements for Baseline Drawings) of the Regulation of the Hungarian Chamber of Engineers, under the title of “Requirements for the contents and format of the design documentation in the field of the permitting of construction and technical implementation of works”, Volume I: Rules for Buildings (effective from 26 May 2017), hereinafter referred to as "the Regulations", sets out the following provisions:

„4.2. Unpriced bill of quantities, itemized bill of quantities

An itemized non-priced bill of quantities defining the most important volumes of the structures and materials depicted in the drawings, developed at a depth based on the detail of the construction drawings. For the items specified in the bill of quantities, the contractor must also calculate with the purchase and installation of the auxiliary components and materials belonging to the particular works, with special regard to, but not limited to, the materials to create edges/verges, strips to cover joints, fixing and supporting elements, adhesives and seals. The design documentation must state that the bill of quantities is to be handled together with the design documentation, that checking the quantities specified shall be the task and the responsibility of the contractor, and that, in the event of any discrepancy between the bills of quantities and the design documentation, the design drawings shall apply.”

As the aforesaid shows, the non-priced bill of quantities is a mandatory part of the baseline design. Accordingly, the bill of quantities shall be prepared by the customer with the involvement of the designer.

It is in the interest of all actors in the construction industry to always ensure the highest professional standards with the bills of quantities, therefore we should strive to apply a well-maintained software for preparing the bills of quantities, available to everyone, offering a wide range of items as well.

The bill of quantities must contain all the items needed for the implementation of the works. The bill of quantities must be prepared by using the items available in the dedicated software, by using as detailed breakdown of the items as possible.

In general, the quantitative data can be calculated from the drawings, but there may be parts of the works whose quantities can only be specified in the bill of quantities. Frequent use of '1 set' as a quantity unit should be avoided. The bill of quantities should include all temporary and auxiliary facilities (roads, fences, containers, etc.) and cost elements (e.g. dewatering, public area occupation fees, insurance, temporary energy charges), which are incurring in connection with the construction works.

An item in the bills of quantities consists of the text of the item and the indication of the quantity and the quantity unit. The non-priced bills of quantities should be made in a two-column format, with a breakdown of materials and rates. The work types must be summarized in each case, and a main summary must be created thereon.

The bills of quantities should be suitable for calculating the value of the interim invoices from the information therein on the monthly performances.

The Civil Code (Ptk.) Section 6:252. § (3) says that the building contractor is required to inspect the design documentation supplied by the customer before the conclusion of the contract, and shall bring any notable defects and discrepancies in the design to the customer's attention. If any defect or discrepancy in the design surfaces in the process of construction, the building contractor shall notify the customer thereof without undue delay.

Similarly, Épkiv, Section 3.§ (1) also stipulates:

„After the conclusion of the construction contract, the building contractor will bear the legal consequences arising from the deficiencies of the design documentation that the contractor should have observed with the professional care expected of him, but he had failed to indicate it prior to the conclusion of the contract."

Therefore, the contractor must carry out the control of the quantities before the conclusion of the contract, as we assume that the customer is a layman, not a professional, and he does not recognize the errors and deficiencies of the bill of quantities - even with due care. The Regulations also expressly refer to the rule that *it is the building contractor's task and responsibility to control the specified quantities.*

If the contractor wishes to partially depart from the content of an item in the bill of quantities, he must indicate the change at the given item (except in public procurement procedures).

The importance of revising the bill of quantities is particularly emphasized by the fact that, in the case of a flat-rate contract, the contractor cannot refer to quantitative errors in the bill of quantities after signing the contract. The contractor must carry out the items that are not included by the bill of quantities, but are included by the construction design documentation, without further remuneration, as additional work, if it was foreseeable at the time of the conclusion of the contract. (See also the entry on Additional work - extra work.) It is advisable to set out the order of the priority of the documents governing the construction works, in order to avoid subsequent disputes. This order is freely determined by the parties, but it is advisable to follow this sequence: design drawings, technical specifications, bill of quantities. Accordingly, the conditions for proper execution should be decided if there is a contradiction between the documents.

2. Advantages-disadvantages

The consistency of the documents that are part of the construction documentation and the compliance of the bill of quantities with the design/drawings are essential in the course of the construction works. This is especially true because, in the case of construction contracts, disputes between the parties are in many cases based on special issues arising from these differences, miscalculations, missed items, and so on.

3. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:244-245.§, 6:252.§;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Section 3.§, Annex 1

Contractual penalty

1. Concept and characteristics

Contractual penalty is an additional obligation securing the contract by which *the obligor may pledge to pay a certain sum of money in case he fails to perform the contract for reasons attributable to him*.

The Civil Code therefore denotes contractual penalty as one of the sanctions for breach of contract.

It is important that a penalty may be stipulated only in writing, and it should be specified in the construction contract in detail what kind of breach of contract (e.g. late performance, cancellation or defective performance) is subject to a penalty payment obligation.

Penalty is flat-rate type of compensation, so it is sufficient for the claimant (who is typically the customer in the construction contracts) to claim the penalty provided for in the contract, if the grounds underlying a breach stipulated in the contract (e.g. late performance, defective performance or cancellation) have objectively taken place. The person entitled to a contractual penalty must only prove the occurrence of a breach of contract, and it is not necessary that he should incur damage due to the breach of contract. The penalty can therefore be enforced regardless of whether or not a damage has incurred by the obligee, or regardless of the amount of damage as well. If the obligee incurs damage in addition to the penalty, he is entitled to enforce also a compensation in addition to the penalty, what is more, he is entitled to claim a compensation even if he has not enforced his claim for contractual penalty.

The obligor shall be relieved from the obligation of payment of contractual penalty, if his non-performance is excused.

In the construction contracts, the following types of penalties are found most frequently:

1. Late performance penalty,
2. Cancellation penalty,
3. Contractual penalty for lack of conformity.

As the above three types of penalty are suitable for the sanctioning of virtually any breach of contract, the above penalties will provide the customer with an adequate security to enforce the performance and to sanction any non-performance or non-contractual performance.

2. Types of contractual penalty

2.1. Late performance penalty

Where a late performance penalty has been stipulated, the obligor is obliged to pay a penalty if he fails to fulfil his obligations for reasons attributable to him by the deadlines specified under the contract (whether such deadlines are interim or final). Payment of the penalty stipulated for the cases of delay (late performance) does not relieve the party from his obligation to perform.

2.2. Cancellation penalty

The cancellation penalty serves as a security for the obligee in the case of non-performance -- attributably to the obligor -- of the works forming the subject matter of the construction contract. The enforcement of a penalty stipulated for the cancellation of performance will preclude the claiming of performance. It should be noted that, in order to ensure the balance of the rights and obligations of the parties ensured by the contract, it may be appropriate to stipulate an obligation – to rest with the customer -- to pay a cancellation penalty. In this regard, Position Paper no. GK 57 of the Supreme Court also contains -- non-binding – guidelines, stating that if the performance has become impossible for reasons arising within the customer's sphere of interest, he may be liable to pay a cancellation penalty on the basis of his contractual obligation undertaken in the contract to pay a contractual penalty.

2.3. Contractual penalty for lack of conformity

Essentially, the point at which contractual penalty for lack of conformity differs from cancellation penalty is that, in the case of contractual penalty for lack of conformity, the obligor actually fulfils his contractual obligations, but the service he performs does not meet the quality requirements specified by law or stipulated in the contract.

The Civil Code states it as a principle that in addition to contractual penalty for lack of conformity, the obligee shall not be entitled to make any guarantee claim, that can otherwise be enforced also in the event of lack of conformity.

In relation to the comparison of the late performance penalty, the cancellation penalty and the contractual penalty for lack of conformity, and to their relation to each other, it should be emphasized that:

- in the event of enforcing a late performance penalty / contractual penalty for lack of conformity, the obligee may require also the obligor's performance in addition to the payment of the penalty in the amount due under the contract, while claiming the amount of the cancellation penalty will preclude the claiming of the performance,
- the enforcement of a cancellation penalty excludes the enforcement of a late performance penalty / contractual penalty for lack of conformity. That is, it is not possible to claim performance at the same time when a cancellation penalty is claimed, therefore at the same time claiming late performance penalty / contractual penalty for lack of conformity – parallel by which performance is also claimable -- is conceptually excluded.

3. The amount of contractual penalty

As for the amount of the contractual penalty, the Civil Code does not include provisions, therefore – on the basis of the principle of contractual freedom – its definition falls within the discretion of the parties.

The decade-long, governing practice developed – and being continuously formed -- by the architect trade of and by court judgment, shows that in establishing the amount of the penalty, the proportionality requirement must be taken into account, i.e. we propose to adjust the amount of the penalty to the value of the service specified in the contract.

For the sake of a balanced contractual relationship, we recommend that the parties should conclude such construction contracts, in which the amount of the stipulated penalties is limited.

The relevant provisions of the Civil Code do not specify the amount and the maximum of the contractual penalty, however, the law says that the excessive contractual penalty can be reduced by the court at the obligor's request.

According to the jurisprudence developed by the relevant court judgments, the amount of the contractual penalty should be deemed to be excessive if its amount is significantly disproportionate to the value of the service to be provided under the contract. Thus, in the case of a reduction of the amount of the penalty by the court, the court bases it primarily on the obvious disproportionality, and, although with a less weight, examines the obligee's interest in the performance, examines whether the breach should entail a lighter or a more serious assessment, the extent of the disadvantage and the position of the parties.

In exceptional cases, the law may prescribe or maximize the amount of the penalty (e.g. Act CXLIII of 2015 on public procurement, Section 134.§, or Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects, Section 27.§).

4. Advantages-disadvantages

As can be seen from the foregoing, to enforce a contractual penalty, there is no need for damage to occur, neither for proving it. Since in a lawsuit it is always difficult and risky to prove a damage and its amount of money, therefore it is obvious that the enforcement of a penalty by a court -- where these facts do not have to be proven -- is always much easier and more favourable for the obligee. The advantage of a contractual penalty lies basically in that.

5. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:186-189.§;

Act CXLIII of 2015 on public procurement, Section 134.§;

Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects, Section 27.§.

The exemption of the contractor from the consequences of breach of contract – Force Majeure

1. Concept and characteristics

In contractual relations, especially in the case of construction contracts, it is often the case that a party is not able to fulfil – or only with a delay -- some of his obligations assumed in the contract, with view to the fact that an unforeseeable and unavoidable event occurs that cannot be attributed to him, and which excludes the contracting party's liability for late performance or non-performance.

For the events of any loss caused by non-performance, Section 6:142. § of the Civil Code lays down that the person who causes damage to the other party by breaching the contract shall be liable for such damage. The said party shall be relieved of liability if able to prove that the damage occurred in consequence of unforeseen circumstances beyond his control, and there had been no reasonable cause to take action for preventing or mitigating the damage.

So, for the said party to be relieved of the liability of paying compensation for a damage caused by breaching the contract, it is essential that the above said three conjunctive terms exist under any circumstances:

1.1. Circumstances beyond the control of the breaching party: Typically, these can be natural disasters (floods, fires, etc.), certain socio-political events (war, revolution, etc.), certain state measures (embargoes), radical market changes (drastic exchange rate fluctuations, etc.) -- these conditions, which are beyond the control of the parties, are called "force majeure". However, this does not include any disturbances in the internal operating order of the party concerned, the behaviour of the employees of that party, difficulties in obtaining supplies, etc.

1.2. Unforeseeability:
the event must be objectively unexpected, unpredictable. It does not, therefore, lead to the party's exemption, if the party ought to have taken into account the given event (e.g. a war situation in a particular area) already at the time when the contract was concluded. For example, according to the judicial practice, if the war situation in a given geographical area was already clear at the time of the conclusion of the contract, the party could not be relieved of the consequences of the resulting breach of contract even if the war would otherwise have qualified as a force majeure event.

1.3. It was not expectable from the party to take action for preventing or mitigating the damage:

As the range of events that can be avoided or eliminated at a given level of technology at the right expense becomes wider and wider, therefore, in judiciary practice, it is a priority question to answer whether in the given case was it

expectable from the party to eliminate the given circumstance at a reasonable cost.

2. Documenting events

In the construction industry practice, it is often the case that unforeseeable, unavoidable events (shown in the above list) occur -- typically due to natural forces or weather phenomena --, which cannot be attributed to the contractor, but which may still impede or may, eventually, prevent the contractor from his contractual performance. When such events occur, we recommend to enter a detailed, exact description of the event in the construction log, and if its nature is such that it makes the performance of work impossible for a longer period of time, and this also affects the fulfilment of the (interim) deadlines specified in the contract, then it is strongly recommended in any case to inform the customer in writing, by way of a letter, describing in detail the cause of the situation and its effects, and to request the amendment of the construction contract by mutual agreement with regard to the (interim) deadline for performance.

In this context, it is important to be aware also of the fact that, pursuant to the Civil Code, the parties are subject to a duty of communication to one another, that is: *"Where any impediments are likely to occur in the performance of any contractual obligation, the parties shall notify one another thereof, unless the other party should have been aware of the impediment even without notification."* In the event of failure to fulfil this obligation, the negligent party shall be held liable for damages in accordance with the provisions on liability for non-performance of an obligation.

3. Involvement of the aggrieved party

In other regards, the Civil Code provides as follows: as regards the definition of damage and the mode of compensation, and in connection with damage caused by a breach of contract, the aggrieved party's obligation relating to damage control and to the prevention and mitigation of damages, and the division of liability among parties bearing joint liability for damages shall be governed by the principle of non-contractual liability.

In this context, it is important to highlight that the aggrieved party is subject to an obligation relating to damage control and to the prevention and mitigation of damages. The party who caused the damage is not obliged to compensate a damage caused by a culpable breach of these obligations -- that is, if the aggrieved party does not make every effort to mitigate the damage.

Where the obligee (e.g. the customer) has also been involved in giving rise to the damage, the liability for damages shall be borne by the tortfeasor and the aggrieved party consistent with the degree of their culpability, or - if this cannot be determined - in proportion to their respective involvement. If the degree of involvement cannot be verified either, the tortfeasors and the aggrieved party shall cover the damages equally.

4. Advantages-disadvantages

The parties are fundamentally responsible for the damage caused by their breach of contract, and, as is clear from the above, they can be relieved of this liability only in a very narrow circle. We note here that the parties are entitled to exclude or limit their liability for breach of contract by mutual agreement, but a contractual clause limiting or excluding liability for a breach of contract caused deliberately, and for breach of contract that causes damage to human life, physical integrity or

health is null and void.

Should a breach of contract result in damage, then the obligee (who is usually the customer) will also be responsible for doing everything within the scope of his obligation to mitigate damage -- otherwise he also will be subject to charges.

5. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:126.§, 6:142.§, 6:144.§, 6:152.§, 6:192.§.

Milestones

1. Concept and characteristics

Milestones are not explicitly defined by law. The milestone is a tool used in project management, which has the function to designate the technical readiness points (complex points of progress) important to the customer, as defined in the project schedule, and to attach contractual legal consequences thereto (possibility for the issuance of invoices, penalty, termination, etc.). A similar approach is taken by Épkiv. when it talks about "performance stages" or "construction work stages" in several places within its text. In some cases, from a legal point of view, a milestone may be considered a partial performance in the case of divisible services.

The implementation of a complex project involves the execution and fulfilment of several minor subtasks. These task groups also divide the process of the project into parts, and at the same time provide the project management with the opportunity to control the progress of the work while project tasks are being performed.

The “signboards” belonging to the natural implementation phases of projects are called the milestones of the project.

A milestone contains two elements:

- a description of the status to be reached,
- the conditions and criteria necessary to achieve the desired condition, which are specific and measurable.

The practice of recent years shows that -- due to the complexity of construction works projects and due to the complex relationships between the implementation processes -- there is a well-founded customer demand for setting milestones.

The milestone is a tool in the customer's hands suitable for the examination of either the legal steps to be taken in order to perform the contract, either the individual phases of the design, or the expected progress of the implementation of works. Its point is that the contractor's contractual performance at a given time can be verified by reaching a predetermined readiness status / criterion or by the occurrence of an event.

The parties set time limits in the contract for the fulfilment of milestones, for a failure of which they may attach sanctions too. The ultimate goal of milestones is to ensure the continuous traceability of the project. Milestones also make it possible for the customer to detect any delays in the performance in a timely manner, and to mitigate or prevent damage or consequences caused by delay.

2. The function of milestones

Many factors can influence the timely realization of a project. The customer checks the fulfilment of a contract on the basis of the schedule assigned to the contract and, in the event of any delay that can be established on this basis, may request measures from the contractor (e.g. accelerating the works, the involvement of more workforce, etc.), may apply a penalty according to the contract, and may even terminate the contract in case of a serious breach of contract. (he may withdraw from the contract before the commencement of the performing of the contract) or, if appropriate, he may involve another contractor.

In the case of projects whose volume is higher from the point of view of the continuous financing of the construction works, it is absolutely necessary to ensure opportunity for the accounting of interim invoices, which are typically linked to milestones. If the amounts of such interim invoices and the conditions for the issuance of such invoices are clearly defined and tied to objective conditions, it greatly reduces the possibility of disputes on the settlement of accounts.

The fulfilment of a milestone can actually be required from the contractor if a failure to perform it or a delay in its fulfilment entails sanctions. For this reason, the parties often agree to impose a penalty to some highly important milestones in the contract, in line with the importance of each milestone and, in the event of a major delay in meeting the time limit set for the performance of a milestone, the parties lay down the right of cancellation in the contract. In many cases, the parties agree that the penalty or retention money associated with the late delivery of a "milestone" will be returned to the contractor in the event of the next "milestone" or a timely full completion of the entire works. In the construction contract, it is expedient to regulate in detail the way in which the performance/the missing of a milestone should be documented, which may form eventually the basis for a successful claim enforcement. In any case, the fulfilment of milestones should be verified by way of a report.

3. Formulation of the technical contents of milestones

It is in the interest of both parties that the customer's requirements should appear in the simplest, technically exact and legally clear terms in the textual content of the milestones. These requirements should be verifiable in a simple manner at the end of the given deadline, and they should not give rise to a dispute.

Some practical examples of milestones for a contract that includes both design and construction (the mode of verification in parentheses):

- *- The permit drawings prepared by the contractor on the basis of the tender drawings issued in the Tender Documentation, together with the other documents required for the issuance of the permit have been submitted to the Construction Authority (ETDR + Protocol)*
- *- the building permit has been issued (undertaking the delivery of a final building permit may be uncertain and risky, since the coming into effect depends not only on the contractor's activity but also on third parties beyond his control) (ETDR + protocol)*
- *- the construction drawings have been handed over to the customer (protocol)*
- *- the deep foundation works have been completed, the cutting back of piles have been completed, the further construction of the structure is not impeded (protocol)*
- *- the construction works of the monolithic reinforced concrete structure have been completed, the formworks have been removed, the quality repairing of the concrete surfaces is allowed / not allowed after the milestone day (protocol)*

- *- there are no leakages in the building any more, the roof insulation is completed, the facade doors and windows are in place, except for the doors to the traffic routes marked on the organizational plan (protocol)*
- *- the floor finishes and painting are completed in the premises that are affected by the technological assembly work and are specified in the contract in a separate list; the delivery of the technology may start (protocol).*

When defining the milestones, particular attention should be paid to ensuring that their definition fits perfectly into the schedule of the works and the technological order, i.e. the achievement of a milestone should not hinder the completion of a technologically subsequent implementation phase (e.g. if a milestone was determined so that it gets completed when all exterior doors and windows have been installed, then the fulfilment of this milestone may be impeded by the fact that, in a next phase, such mechanical or technological equipment must be delivered into the building, which (because of their size) can only be taken through the full openings left free for the doors and windows, before the installation of the doors and windows, etc.).

If the parties, in the construction contract, define an excessively and unreasonably high number of milestones, their continuous monitoring may hinder the contractor's activities. In doing so, it should also be noted that although the customer is entitled to give instructions to the contractor, however, these instructions may not extend to the organization of the activity and may not make the contractor's performance more difficult – that is, the milestones may not unduly restrict the contractor's room for manoeuvring within the frames of the implementation schedule.

4. Advantages-disadvantages

Thus, as stated above, the milestones agreed upon reasonably by the parties, and sanctioned in justified cases, act as an incentive for the co-operation of the parties, may indicate a failure or a delay in performance in a timely manner, and it can prevent or mitigate the consequences of later major errors and delays if alternative solutions or reorganizations, etc. are implemented in time.

However, if the excessively high number of milestones obstructs the organization of works by the contractor, it places an unreasonable burden on the contractor (and also on the customer because of the eventual continuous site visits and checks).

5. Relevant major pieces of legislation

Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.);

Act V of 2013 on the Civil Code, Section 6:240.§.

Definition of the quality requirements assigned to the technical contents

1. Concept and characteristics

The quality requirements assigned to the technical contents are primarily defined in the construction designs.

According to the provisions of Étv. Section 38.§, construction activities may be carried out on the basis of construction documentation, unless otherwise provided by government decree. The contractors' general practice shows that, subject to the previous paragraph, it is advisable to require the existence of the construction design documentation, even if the law permits the implementation of construction works in the absence of such documentation. According to the judicial practice, the designs/drawings should be considered as the customer's instructions.

In most of the cases, it is the customer who has the design documentation made, therefore the designs/drawings made in the course of the design process will incorporate solutions optimal for the customer in terms of both engineering and costs.

In all cases, the construction work can only be carried out in the possession of a construction design documentation that meets the requirements of Épkiv, and in particular the requirements applicable for content as stipulated by Annex 1, and which has been signed by the customer as a sign of his approval and agreement, and which contains all the information as regards the quality requirements for the materials to be used and the structures to be prepared in the course of the construction works.

Regarding the content requirements of the construction documentation, the regulations of the Hungarian Chamber of Architects and the Hungarian Chamber of Engineers should also be taken into account.

Although it is the designer who is primarily responsible for the correctness of the designs/drawings, however, the contractors of the various special construction trades must always review the designs/drawings and must inform the customer before concluding the contract, if the designs/drawings or part of them are unsuitable for implementation. If the contractor fails to do so, the resulting, subsequent legal consequences must be borne by him.

Section 6:252. § (3) of the Civil Code provides that the building contractor is required to inspect the design documentation supplied by the customer before the conclusion of the contract, and shall bring any notable defects and discrepancies in the design to the customer's attention. If any defect or discrepancy in the design surfaces in the process of construction, the building contractor shall notify the customer thereof without undue delay.

The last sentence of Épkiv. Section 3.§ (1) is in accord with the aforesaid rule, and provides as follows:

"After the conclusion of the construction contract, the building contractor shall bear the legal consequences arising from such a deficiency of the design documentation that the contractor should have observed applying the professional care expected of him, but failed to bring it to attention before the conclusion of the contract."

Ideally, therefore, we have a flawless design that sets out the standards for the technical content of each workpiece, and in addition, the materials to be used are specifically named therein. In this case, the construction works must be carried out in accordance with the requirements set out in the standards and in the manufacturers' instructions for use. It is important to know that, according to the provisions of Act XXVIII of 1995 on National Standardization Section 6.§, the application of national standards is voluntary, therefore it is practicable to lay down the application of the various standards in the designs as fully as possible, and to make these standards annexed to the contract or to refer to the application of the relevant standards.

When defining the quality requirements under the contract, the following rule of Section 6:123. § of the Civil Code should serve as the basis for the quality of services, according to which, performance shall be in conformity with the contract, that is to say, services, at the time when supplied shall be suitable for their intended purpose; it also says that for the purposes of compliance of the service with the intended purpose, quality requirements shall be taken into account as well, and if the parties have not stipulated the quality, performance shall be made in conformity with commercially available goods of standard good quality.

If standards are not available, it is up to the contracting parties whether they decide to apply a specific set of requirements issued as a Technical Guidelines, but this must be specified in advance, in writing, in the contract.

In this respect, the guidelines of various professional organizations are already available, which provide a good basis for judging the technical content of the contract. Examples of these are, for instance, the publications of ÉMSZ (the Hungarian Association of Building Insulation, Tinsmiths and Roofers) associated with roof insulation, façade insulation and tinsmith works.

It should be noted that Ministerial Decree 36/2016. (XII. 29.) MvM commissioned the Engineering Regulation Committee for Construction (Építésügyi Műszaki Szabályozási Bizottság) with the elaboration of the Technical Guidelines fully covering the construction industry; ÉMI Nonprofit Kft. was assigned to perform the coordination of the aforesaid job. The guidelines adopted by the Committee will be displayed in the *Engineering Database for the Construction Industry (Építésügyi Műszaki Adattár*) established by ÉMI Nonprofit Kft., and operated by Lechner Nonprofit Kft., which will be electronically available free of charge for everyone.

So it will be worth to visit the ÉMI website at regular intervals and learn about developments.

If the parties do not specifically intend to agree on the application of a specific Technical Guideline, we recommend that, as a good practice, the order of priority of the documents should be fixed in the contract as follows:

1) MSZ EN Standards
2) Technical Guidelines
3) Application-engineering Manuals
4) Process Instructions prepared occasionally.

2. Advantages-disadvantages

It is important that the quality requirements expected by the customer should be defined clearly and in sufficient detail in the construction documentation

and in the construction contract, as otherwise even the exact quality that should have been delivered by the contractor may become disputed.

So before the commencement of the construction works, the application-engineering manuals or the process instructions must be handed over to the designer for approval, since in the case of any future problems, the designer's responsibility can only be claimed in this case.

In the absence of such documents -- especially in the case of structures with special risks -- it is very important to have a specific technical specification elaborated in detail in accordance with the standards or in accordance with the technical guidelines, and containing all the necessary technical information.

The Civil Code makes it very clear too, that on the grounds of design defects, the rights stemming from non-performance may be enforced vis-á-vis the designer insofar as any right exists on account of lack of conformity attributable to defects in performance arising from discrepancies in the design, because, eventually, the design defects will become manifest and obvious in the course of the implementation of the construction works.

3. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:123.§, 6:251-252.§;
Act LXXVIII of 1997 on the formation and protection of the built environment (Étv.), Section 38.§.;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.);
Act XXVIII of 1995 on National Standardization.

Sampling and qualification plan in the construction contracts

1. Concept and characteristics

If the parties have agreed so, following the handover/takeover of the work site, the contractor will prepare and hand over to the customer a Sampling and Qualification Plan (MMT).

In the case of public procurements, in the case of a construction project that reaches or exceeds the EU threshold, the winning tenderer, in the course of the construction works shall have a sampling and compliance-verification plan prepared with specific contents specified in a separate legal act, the completion of which may be investigated by an ÉMI company: ÉMI Építésügyi Minőségellenőrző Innovációs Nonprofit Korlátolt Felelősségű Társaság (ÉMI Nonprofit Limited Company for Quality Control and Innovation in the Building Industry).

An MMT must be compiled so as to ensure that all the activities and work processes to be performed during the execution of the given contract should be inspected during the construction process, in accordance with the applicable standards and (technical/engineering) provisions. The MMT must be prepared for all required special construction areas (architecture, support structures, building mechanics, building electricity, etc.) and must include all the technical specifications, standards, inspection specifications, descriptions, the documentation of inspections and the permissible deviations, applicable for the particular work type or work part.

In the MMTs, it is necessary to determine the grounds on the basis of which the qualification of the given work part will take place. These may include:

- the relevant standards (MSZ, MSZ EN, DIN, ISO, etc.) as defined in the contractor's contract,
- on the basis of individual agreements,
- the project-specific technical provisions,
- the design documentation for construction,
- the process instruction(s),
- manufacturers' instruction(s),
- application-engineering provision(s).

The MMTs must also include provisions for the following questions: the inspection of the given work part is done by whom and how frequently, what kind of test methods will be used during the inspection; also the form of the documentation of the tests performed should be recorded. These may be the following:

- entries to the building log,
- handover-takeover reports,
- measurement and test reports,
- expert opinions,
- sheets for recording on-site visual inspections.

The tests and inspections are carried out and documented continuously, parallel with the project implementation phase. In case of non-compliant performance, it is necessary to determine individually what measures are needed to remedy the defects.

2. Advantages-disadvantages

- for the client / investor: an MMT may provide clarification in advance about the expected material-quality and work-quality, so he can ascertain what performance he will get;
- for the building contractor: he can be certain what kind of documents he can use to verify his performance, and if he supplies such documents properly, his performance will certainly be compliant with the contract;
- for the technical inspector: a system-level commitment to good quality and compliance with law.

3. Relevant major pieces of legislation

Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects, Section 29. §.

The customer’s approvals and controls for materials and structures; "presentation of samples"

1. Concept and characteristics

It is well known that competition is inherent in market economy; this involves not only the competition of contractors but also the competition of technical solutions in the design and execution of construction works: the designs and design documentation of the work to be implemented, and subjected to a competition, must allow the applicants to compete with different solutions, products and technologies – by having the level of the specified technical and other characteristics in mind. This kind of expansion of market competition in the last decade has given great importance to the expectation that in the tender documentation on which the competition is based, the designer should formulate the technical contents by specifying performance requirements or functional requirements, and by references to standards and technical specifications. Customers generally expect (while in public procurements it is a mandatory requirement) that the designers should not refer to a thing of a specific make or origin, or to a specific procedure, if this would lead to the preference of certain economic operators or products; such designation should only be permitted in exceptional cases, and the designer should include the words "or equivalent" in the given specification.

In accordance with the aforesaid principle, it was almost four years ago that Government Decree 275/2013. (VII. 16.) on the detailed rules of the design and installation of construction products in structures and, in this course, of the certification of performance came into force; this legislation contains the detailed rules for the design and installation of construction products in buildings and structures.

These facts give particular emphasis to the fact that in the construction contracts the customer wants to concretise the (designers’) technical content, usually defined by requirement-specifications, still before the installation of the materials, structures and equipment; it is absolutely necessary to regulate the order of this procedure in the contracts, since we are talking here about tasks that are important both for the customer and the contractor.

Generally, the decisions must be made about building materials and equipment, where the proposal is made by the contractor as a specialist company, and then the customer (usually with the involvement of the designer) accepts or rejects the contractor’s proposal. The preparation of the decision requires serious work from the contractor and cannot yield results without a substantial cooperation by suppliers and subcontractors. It is recommended that the contract should clearly state how this proposal should be made, and what kind of documentation should be supplemented thereto, that is:

- it is necessary to present the proposed material and equipment in its tangible, real form, and in a specified quantity,

- - in the event of larger, bulky products or "target products": the place at which the given product can be seen (reference visit, visit in the manufacturer's site, etc.),
- - detailed product information or manufacturer's declaration of performance should be attached in the Hungarian language,
- - permits or qualifications from authorities (if any) should also be attached,
- - the relevant maintenance and / or operating instructions, should also be supplemented,
- - it is advisable, in general, to require the submission of all additional documents, in the possession of which, the customer's / client's responsible decision can be made.

In view of the almost unmanageably high number of construction products, it is worthwhile to specify in a separate annex to the contract, which technical solutions and bill-of-quantities items need to be specified by using the above-mentioned presentation (sample-presentation) procedure. It is also important to stipulate in the contract:

- when the given product or equipment should be presented by the contractor (obviously this date is determined by the latest date of ordering the relevant materials),
- the number of days available to the customer for the acceptance of the sample after its presentation,
- - or, in case of rejection, what kind of obligation rests on the customer to give reasons for the rejection.

2. Specific rules governing the public procurement procedure

It should also be mentioned that the provisions of Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects, Section 28. §. (1) provides that "*the party contracting as a contracting authority and the party contracting as the winning tenderer may, after the conclusion of the contract, carry out negotiations as regards the items of the priced bill of quantities and, in this procedure, they may finalize the single items to be built into the building*." The law also contains an appropriate restriction under paragraph (2): *"in the coordination process, the parties may agree only upon technically equivalent or higher-quality substitute products as regards the building materials and products proposed by the tenderer in his offer."* This provision extends the process of concretising the technical content defined by performance characteristics, and makes it "life-like" by incorporating the contractor's preparation and the customer's decision-making process into the implementation-of-works process.

There is a great emphasis on this in those cases, where the design and the construction works are executed under a single contract, and where the materials, structures, and equipment can only be identified during the construction design work. In this case, the customer will obviously need special support to his decision-making in addition to that provided by the designer, in the course of the sample-presentation process -- it is therefore important to clearly record the approval period in the contract due to the time the aforementioned process takes.

In addition to the above, the customer has the right and also the obligation to exercise control over the materials and structures to be built in, not only in the process of installation, but also when they have already been installed, which right/obligation is generally exercised by way of technical inspectors. We also note, however, that, according to the Civil Code, the contractor's liability for breach of contract is not affected by the fact that the customer did not or did not properly control the activity of the contractor.

3. Advantages-disadvantages

In view of the large variety of building products, customers would like to decide exactly what parameters should those products have that are going to be used in the course of the construction process. On the one hand, this is beneficial for the contractor, since the customer approves the product to be used beforehand and, consequently, the suitability of the selected - and possibly already installed - product is not disputable; on the other hand, also the customer can be sure that the contractor uses such quality products in construction, that will meet the customer's needs.

With respect to the aforesaid, however, it is important that the contract should specify the exact time frame within which the customer can exercise his right to select samples.

4. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 2:47.§, 6:134.§, 6:181.§, 6:242.§;
Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects, Section 28.§;
Government Decree 275/2013. (VII. 16.) on the detailed rules of the design and installation of construction products in structures and, in this course, of the certification of performance.

Occupational safety, safety at work

1. Concept and characteristics

The Fundamental Law of Hungary stipulates in Section XVII. (3): *„ Every worker shall have the right to working conditions which respect his or her health, safety and dignity.”* In accordance with this principle, several laws regulate the personal, material and organizational conditions that do not put the health and safety of workers at hazard when work is performed, in order to protect the health and work ability of workers in organized work and to humanize working conditions, thereby preventing work-related accidents and occupational diseases. In this way, legislators are bound to define the tasks, rights and duties of the state, the employers and the employees in this area.

It is well known that building and construction activities are highly dangerous to life and health; this is why it is important to emphasize that the safety of workers and the creation of conditions for accident-free work precede all project goals. Evidently it is forbidden to perform work in a work area where proper safety conditions are not provided. In general, the construction industry is characterized by a large number of dangerous work processes (for example, working at height, lifting and hoisting of materials, structures, etc.), but the special conditions (e.g. working in operating plants, working under electrical voltage, etc.) also require due attention and specific, individual technical and organizational solutions.

It is obvious that the technical content, the spatial and temporal organization conditions of the contract between the customer and the contractor, the conditions of performance, the deadlines, the work organization solutions all fundamentally determine this process, during which the safety aspects of the work should be of primary importance. This is the reason why we draw the attention of the contracting parties to the duty to cooperate and communicate information provided for by the Civil Code among the basic principles of the law of contracts, in its Section 6.62. § (1):

„ The parties shall be required to cooperate during preliminary negotiations, at the time of the conclusion and termination, and during the life of the contract, and shall be duty bound to communicate information to each other on circumstances relevant to the contract.”

In our opinion, the safety-related issues must always considered to be such *“relevant circumstances”* – and although the primary responsibility for this area rests obviously with the customer, still a cooperation between the contractor and the customer is indispensable in the relevant areas; just let us remember, for example, the situations when:

- the construction work must be carried out on the site of the customer's operating plant,
- the work site is located near or between the customer's operating lines,
- the customer employs several contractors at the same work site, as co-operating contractors,

– because of the client's sphere of interest, the construction works must be carried out in working hours or in work schedules other than those generally used, etc.

All of these issues that require collaboration must be clearly provided for in the construction contracts – ranging from the definition of the boundaries of responsibilities to the effects of such issues on the works.

In this respect, it is also important to be aware of the fact that the contractor, pursuant to Section 6:240.§ (2) of the Civil Code, is not entitled to, but is expressly required to, refuse to comply with the instructions of the customer / main contractor, if compliance would constitute an infringement of the law or any administrative decision, or it would jeopardize the safety or property of others. Thus, under this provision, the contractor may not, even in spite of such instructions from the customer, disregard the application and enforcement of binding labour safety legislation.

The parties' contractual cooperation is strengthened and the importance of occupational safety is emphasized also by Épkiv. 22. § (3), which defines as part of the design documentation the occupational safety and health plan prepared by the contractor but supervised by the design coordinator. It is therefore practicable if the construction contract provides for also the deadline for the preparation of this plan, and the method and timing of the audits, if it is the designer who prepares the construction design documentation on the basis of a design contract concluded with the customer.

2. Advantages-disadvantages

On the basis of the above, it can be seen that the provisions and regulations concerning occupational safety have a prominent role at each stage of the implementation of works - starting with the design task -, and these provisions must be taken into consideration mutually by the parties taking part in the implementation of the works. For this reason, it is advisable for the parties to consider, in the course of construction, the conclusion of insurances that provide adequate cover for mitigating the risks, as personal injuries or damage to properties may occur even in the case of compliance with the relevant occupational safety provisions.

3. Relevant major pieces of legislation

Act V of 2013 on the Civil Code;
Act XCIII of 1993 on safety at work;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.);
Ministerial Decree 5/1993. (XII. 26.) MüM on the implementation of certain provisions of Act XCIII of 1993 on safety at work;
Joint Ministerial Decree 4/2002. (II. 20.) SzCsM-EüM on the minimum requirements of safety at work to be complied with at construction work sites and during construction work processes.

The technical contents

1. Concept and characteristics

In the course of construction works in the building industry, the parties typically enter into a construction type or a works type contract. According to the Civil Code, under a works contract, the contractor undertakes to perform activities to achieve the result agreed upon, and the customer undertakes to accept delivery of and pay the contracted fees for such works.

Under a construction contract the building contractor undertakes to carry out building and installation works and to deliver the works, and the customer undertakes to accept delivery of and pay the contracted fees for such works.

Therefore, the works type contracts are basically so-called result-obligations, which, in practice means that the contractor is obliged to create some concretely defined results, works. However, in order for the contractor to be able to create a future result, and that the customer can verify the appropriateness of the result, the activities that the contractor should perform under the contract must be described in appropriate detail - this is what the professionals in the given trade call the technical content of the contract. Obviously, depending on the scope of the contract, it may be “only” building and installation works, but it may also extend to the performance of the full range of engineering design works and technological installation works. This activity is always very diverse, very complex and requires great responsibility, so it is in the common interest of both parties to specify the technical content in detail in the contract. Épkiv. Section 3.§ (2) c) also expressly provides that the construction contract must specify the exact name of the undertaken building construction activity or building and installation work, by defining the requirements (quantity and quality indicators) applicable to the structures and building activities.

2. The agreement of the parties for developing the technical contents

The parties must reach a consensus on the development of the technical contents of the contract. During their negotiations, the parties obviously start out from the invitation-to-tender documentation reflecting the customer's needs and from the designs that may already exist. These are associated with, complemented by the contractor's – as a specialist company of the given trade -- tender. Ideally, the two documents are fully compatible with each other, and this makes the technical contents of the contract, but practice shows that, in complex projects and construction works, these documents may, even with the utmost care and professionalism, contain errors, omissions, erroneous calculations, etc., which may eventually not be realized by the customer – who, otherwise, is not necessarily familiar with the given trade. This is case, when the following question becomes the focus of the discussions: whether the invitation to tender made available by the customer, or the tender made by the contractor should constitute the technical contents of the contract.

It is therefore advisable for the parties to have clear provisions on this question in the contract, even in that way that they make a list of the documents forming part of the contract, and determine in which order of priority the documents will prevail in the event of any discrepancies between them.

Obviously, the customer wants to give priority to his own considerations and expectations, often because the compliance between the contractor's tender and the invitation to tender is hardly identifiable and verifiable for lay customers.

At the same time, the contractor's side argues so, understandably, that the technical content of the contract should be constituted by the contractor's winning tender, as it was drawn up by the contractor (the former bidder) on the basis of the bidding and invitation-to-tender documentation provided by the customer (the former contracting authority), and that the contractor, in his tender, took into account all the circumstances and conditions of the implementation planned by him.

It is therefore important, that the parties should meticulously coordinate the details of the tender, that they should document it or agree upon it, and that the final version of the documents developed jointly on the basis of this agreement between them should constitute the basis for their contract.

It is also important that the contracting parties should not ignore the tender-preparation and –coordination processes either; they should endeavour to document in detail the modifications and concretised technical solutions agreed upon in the course of those processes, and that the documents in question should become parts of the technical contents.

In the course of the aforesaid procedure, attention must be paid to the fact that the technical contents formulated as described above

- will, firstly, "*materialize*" in the designs, i.e. all the changes that have taken place in the tender process in this field, must be transferred to the technical documentation (at least in the form of a technical description),
- secondly, the technical solutions (materials, structures, products, equipment) that were left open in the documentation because of the definition of "*specified or equivalent"* in order to meet the purposes of technical equivalence, have become concrete in the final tender of the contractor,
- thirdly, the bill of quantities in the contractor's final tender includes unit prices and subtotals per types of works, which are indispensable for invoicing, for the subsequent extra works, and for the customer's accounting-financial activation work upon completion.

A clearly defined technical documentation forms the objective basis also for the question: what should be considered as extra work and additional work during the implementation process -- this is discussed in the relevant subsection herein.

3. Advantages-disadvantages

As is clear from the aforesaid, it is in the interest of both parties that the contract be based on a precise and clear technical documentation. If, during the pre-contract negotiations, several documents with different contents (design, invitation-to-tender documentation, tender, etc.) were made, it is absolutely necessary to make a list of the documents forming part of the contract, and to determine which of them will have priority, and in what order, in the event of a discrepancy between them. It is, of course, determined by the parties' contractual freedom, whether the documents of the customer or of the contractor will be the first in the order.

4. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:238.§, 6:252.§;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Section 3.§.

Warranty, guarantee

1. Concept and characteristics

In the meaning of the general provisions of the Civil Code, performance shall be in conformity with the contract, that is to say, services, at the time when supplied:

„a) shall be suitable for any particular purpose for which the obligee requires them and which the obligee made known to the obligor at the time the contract was concluded;

b) shall be suitable for their intended purpose and in conformity with other services of the like;

c) shall be of a quality and performance that are normal in services of the same type and that the obligee can reasonably expect, given the nature of the services and taking into account any public statements on the specific characteristics of the services made about them by the obligor or - if produced by a person other than the obligor - the producer and their representative;

d) shall comply with the description given by the obligor and possess the qualities of the services the obligor presented to the obligee as a sample or model; and

e) shall be in conformity with the quality requirements defined by law."

In the event of contracts for pecuniary interest, the obligor shall be liable to provide warranty for lack of conformity. So, if one of the parties performs his services with a lack of conformity, in other words, if the services, at the time when supplied, are not in compliance with the above criteria, then the party shall be liable to provide a so-called warranty.

2. Warranty

In connection with warranty, it is important to mention that this is an objective liability, in other words, the contractor cannot be released from his liability on the grounds of proving that the lack of conformity occurred in consequence of unforeseeable events/circumstances beyond his control. He will, however, be released from liability if the lack of conformity was known or should have been known by the customer at the time when the contract was concluded.

In the event of enforcing a warranty claim, the customer *„shall have the option*

a) to choose either repair or replacement, unless compliance with the chosen warranty right is impossible or it results in disproportionate expenses on the part of the obligor as compared to the alternative remedy, taking into account the value the service would have had there been no lack of conformity, the significance of the non-performance, and the harm caused to the obligee upon compliance with the warranty right; or

b) to ask for a commensurate reduction in the consideration, repair the defect himself or have it repaired at the obligor's expense, or to withdraw from the contract if the obligor refuses to provide repair or replacement or is unable to fulfil that obligation under the conditions described in Subsection (4), or if repair or replacement no longer serves the obligee's interest."

In addition to the aforesaid, the customer is entitled to switch from the warranty right he has selected to another, and the cost of switch-over shall be paid to the contractor by the customer, unless it was made necessary by the contractor's conduct or for other reasons.

The new Civil Code has brought radical changes in respect of guarantee/warranty rules in comparison to the previous regulations. One such cardinal change is that the preclusive time limits for enforcing warranty claims have ceased to exist, instead, the obligee can enforce his warranty claims according to the rules of the statute of limitations as set out by the applicable law. As the warranty time limits are subject to the statute of limitations, in practice it will lead to a situation where we can talk about a lack of conformity in performance only as long as the expectable useful lifecycle of a given service/thing lasts – and this is going to be a question of experts in many cases; this means that , in practice, it will be much more uncertain to determine the time period in which a warranty claim can be enforced.

The right to warranty shall lapse after one year from the delivery date, while in connection with contracts that involve a consumer and a business party, the right to warranty shall lapse after two years from the delivery date. If the things supplied under a contract that involve a consumer and a business party are second-hand, the parties may agree on a shorter limitation period, however, the limitation period may not be less than one year in this case either.

The other major change is that the Civil Code determines specifically the limitation period for warranty claims that can be enforced in the event of real estate properties (five years).

It is important to know that the limitation period shall be suspended for the time during which the thing is being repaired and the consumer cannot use it for its intended purpose, and also, that as regards any part of the thing that has been repaired or replaced, the limitation period for the right to warranty shall recommence.

It arises from the nature of warranty that the costs incurred in connection with the fulfilment of these obligations shall be borne by the obligor. If, however, the defect is attributable in part to the obligee's failure to fulfil maintenance obligations, the costs incurred in connection with the fulfilment of guarantee obligations shall be covered by the obligee to the extent commensurate to his involvement, if he had sufficient information relating to maintenance, or if the obligor has provided the information required to that effect. In the event of replacement or withdrawal, however, the obligee shall not be liable to compensate for the loss in value if it has occurred in consequence of proper use.

It is also a new provision of the Civil Code that where the replacement of a thing is effected after the majority of the warranty period is consumed on account of suspension of the period of limitation, and this would result in considerable increase in value for the benefit of the obligee, the obligor shall have the right to demand compensation for such enrichment. This provision, however, is not applicable in contracts that involve a consumer and a business party.

3. Commercial guarantee

Any person who guarantees performance of a contract or is required by law to provide guarantee shall assume liability for lack of conformity during the guarantee period under the conditions set out in the guarantee statement or in the relevant legislation. The guarantor shall be released from liability if he is able to prove that the cause of the defect occurred after performance.

The difference between the warranty and the commercial guarantee therefore essentially lies in the fact that the burden of proof is different between the two institutions in a possible lawsuit; in the case of warranties, the obligee (buyer, customer) has to prove that the cause of the non-conformity existed already at the time of performance, while in the case of commercial guarantees, the burden of proof gets reversed, since now it is the obligor (seller, building contractor) who must prove that the cause of the non-conformity occurred after the performance, so, that the contractor has performed his obligations according to the provisions of the contract, and the non-conformity occurred for some other reason, e.g. due to a non-intended use by the customer. Since the success of proof always has a risk, it is obvious that the obligee is in a much more favourable position in the case of a commercial guarantee.

Another favour for the obligee is that if the ownership of the thing is transferred, commercial guarantee may be enforced by the new owner against the guarantor.

A commercial guarantee may be enforced during the guarantee period. If the guarantor fails to fulfil his obligations in good time when so requested by the obligee, the guarantee claim may be enforced before the court within three months after the deadline set out in the request even if the guarantee period has already expired. This deadline shall apply with prejudice.

The legal provisions on exercising warranty rights shall be duly applied concerning the enforcement of commercial guarantee rights.

4. Commercial guarantee obligations in the building industry

Before 15 March 2014, for the mandatory period of suitability of the structures of residential buildings, administrative and office buildings, social, health, cultural, educational and supply and service buildings, as the preclusive time limit for the enforcement of warranty claims, Joint Ministerial Decree 11/1985. (VI.22.) ÉVM-IpM-KM-MÉM-BkM on the mandatory period of suitability of the individual building structures and the products to be used for their construction contained provisions.

The above Decree, however, has been repealed by the new Civil Code, for the reason because it has eliminated the mandatory suitability periods. Since the decree has not been replaced by a new decree defining time limits for enforcing warranty claims, therefore, if the subject of a works contract is a real estate property, the customer can enforce his warranty claims in connection with the real estate property – should a lack of conformity occur in any part of the property – uniformly in the five-year warranty period subject to the statute of limitations, as provided for in Section 6:163. § (3) of the Civil Code.

In addition to the aforesaid, the former product list included by the ÉVM-IpM-KM-MÉM-BkM Joint Decree has been transferred to Government Decree 181/2003. (XI.5.) on the mandatory commercial guarantee associated with the building of apartments, and the result of this change was that these things are subject not to a warranty any more, but to mandatory commercial guarantee.

The mandatory commercial guarantee periods set out by the above-mentioned decree are the following: *three years* for the building structures of apartments and residential buildings (e.g. surface finishes of apartments, roofs and their superstructures, residential building doors and windows, etc.) and for equipment of apartments and buildings (e.g. cooking appliances, heating equipment, etc.), enlisted in Annex 1 and 2; *five years* for the roof structures of residential buildings, apartments and public buildings, and for the materials and products used for their construction (e.g. roof coverings, insulation against rainwater and tap water,

plasters, coatings, surfaces, etc.), enlisted in Annex 3; and finally *ten years* for building structures and their materials and products (e.g. foundation structures, load-bearing frames, slabs, roof structures, pipelines of building mechanical systems, pipelines in the ground, etc.) enlisted in Annex 4.

Thus, under the currently effective Government Decree, the contractor is obliged to undertake, depending on the given product, even 10 years of mandatory commercial guarantee for a defect occurring with regard to a residential building built by him, what is more, occurring eventually in a defined structure or a product of a building in public use. This puts an additional burden on the contractor in comparison to a warranty liability, since the burden of proof in this case lies with the contractor. This may entail a significant, unpredictable additional cost, not to mention the fact that, in respect to an excuse, finding the cause of the lack of conformity is much more difficult, and much more expensive 10 years after the performance, than within 1-2 years after the execution of the works.

5. Advantages-disadvantages

As regards the relationship between warranty and commercial guarantee, it should also be pointed out that, while warranty exists through the force of law, even if the parties do not specifically provide for it in the contract, the commercial guarantee obligation arises only if the law provides so, or if the parties expressly agree so -- that is, it can be expected that the commercial guarantee obligation will be priced by the obligor in his tender, in the latter case, thus raising the sum of the contractual consideration eventually.

At the same time, it is important to know that, as described above in detail, a mandatory obligation to provide a guarantee may, in many cases, be imposed also by legal statutes, especially in connection with construction work in the building industry. In these cases, the guarantee obligation applies even if the parties do not specifically provide for this in their contract.

At the same time, it can also be expected that the cessation of the mandatory suitability requirement, as a preclusive time limit, will raise many uncertainties, disputes and questions in practice, and the answers to these questions are expected from the judicial practice.

6. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:157-167.§, 6:171-173.§;
Government Decree 181/2003. (XI.5.) on the mandatory commercial guarantee associated with the building of apartments.

Server-based documentation management

1. Concept and characteristics

Digitalisation, digital transformation, is well under way in all industries, including the construction industry, which is characterized by the transformation of former paper-based documents and processes into the digital world. As a result of this process, the requirements toward the technical documentation change too, which is rather complex due to the specificities of the documentation, and it mostly resembles the handling of legal materials. Examples include production-, quality-management- or design-documentation, measurement protocols, fault lists, etc.

The technical documentation is characterized by the following features:

- they are often large,
- they form documentation units,
- they may vary continuously and to varying degrees (either complete units or small details),
- – - the changes may become effective only after approval, after the updating or replacement of all related document units,
- – - their modification is a strictly regulated process,
- – - some of the current documentation must be available on different devices, including on the field, or on mobile devices as well.
- – In some cases, the management of documentation is coordinated by a central party – e.g. by an independent engineer, or, in other cases, a systematic solution of the party involved in the project will be offered.

2. Technique

Even today, the use of FTP servers is a widespread solution; almost all companies have FTP servers, through which access under controlled circumstances can be ensured to the storage space of the given documentation, providing document upload and download capabilities. However, this is no longer the most up-to-date solution, and it is not always in line with the needs.

Today's up-to-date and secure, cloud-based project collaboration and document management solutions operate over the Internet, in the form of supplied software, in other words: Software-as-a-Service (Saas). The software that provides the service that is usually run by a third-party company, stores the data in a central storage facility (in a cloud), where user access is realized through a thin client (usually a web browser). This documentation management system provides several services: access management, workflow and teamwork support, the use of additional modules and interfaces (e.g. CAD, Office integration, OCR, conversion, etc.), activity logging, reporting, reference and sharing management, search possibility even in the content, etc.

3. Advantages-disadvantages

Modern web-based documentation management systems enable transparent, uniform and standardized documentation ensuring flexible and fast access to relevant and up-to-date documents. These systems provide version management and deadlines management options, and reduce the administrative burdens of documentation management.

Approved and validated document revisions are immediately accessible, and authorised persons can be notified automatically (e.g. by email) which results in a much higher operating efficiency and much better visibility of the required information. At the end of the project, the unified archiving of the final documentation is easier and faster.

A flexibly accessible, unified and centralized documentation management system provides benefits to all participants during the project, for instance in the areas of efficiency gains, information flow, cost reduction, or quality assurance (designers, contractors, investors, operators).

In the case of an electronic documentation management system, the opportunities, internal IT policies, infrastructure, and the assets of the connected companies of different sizes should be taken into account, and the following aspects must also be considered

- - proper internet access,
- - data security, the issue of making backups,
- - different software environment (Windows, Macintosh, iOS, Android,…),
- - technical support,
- - the assignment of responsibilities, the management of authorities.

The question of electronic documentation management is usually not mentioned in the contracts. In practice, this question is agreed upon at the start of the implementation of the construction works. As paper-based documentation will be disappearing, this practice is expected to change, in order to ensure a clear definition of responsibilities.

It is necessary to coordinate the contracts made between the project participants, with the user contracts belonging to the supplied, software-based documentation management solutions. (Availability, technical conditions, etc.)

In those cases, where the documentation management task is carried out by a third-party company, provision must be made in the services contract for the protection of the copyright, the technological protection, as well as the protection of business secrets too.

It must be noted that the e-journal regulated by Épkiv. is also a kind of server-based documentation management interface and an official tool for the provision of data (contracts, statements, protocols). By its very nature, however, it is not suitable for ensuring the necessary continuous flow of daily documentation between project participants.

An important new step in the development of information technology in this field is the BIM (Building Information Modelling), and the application issues of this field should eventually also be provided for in the construction contract.

Technology

Its fundamental element is software-based 3 D virtual design, in which building structures are defined in space, material quality and properties, according to their subsequent construction. The model is suitable for design, for managing design changes, for generating the construction costs, for planning the construction time, and for supporting operation tasks later.

The operation of the technology requires serious, high-performance IT tools and skilled, versatile engineering staff.

The benefits of the BIM-based project support are clearly evident in the exact definition of construction tasks. The knowledge of exact quantities and the elimination of conflicts and design failures help to manage and optimize construction processes. On top of the aforesaid benefits, the spatial model provides an opportunity for laymen to understand the functional and aesthetical aspects of the envisaged building.

With respect to the creation of the model, it is important to clarify who should bear the responsibility for ensuring that the model should conforms to the designed structure in all respects. Who should be the builder of the model, how should he define the building elements. The designer, the building contractor or the later operator may all interpret the job differently, therefore the process of standardization of BIM is under way, which is essential for developing a system-based working mode.

It is important to know that the information is concentrated at the person/entity who is in charge of BIM, therefore this person will be in a key position among the participants.

4. Relevant major pieces of legislation

Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.), Sections 24- 28.§.

Termination of a contract

1. Concept and characteristics

Contracts can be terminated by the parties in two ways: either by mutual agreement between the parties on the basis of their agreement, or by a unilateral declaration by one of the parties

1.1. Termination of a contract by agreement of the parties

A contract can be terminated by a mutual agreement of the parties if they agree upon the question whether they terminate the contract for future purposes, or cancel the contract with retroactive effect to the date when it was concluded.

If the parties, by mutual agreement, terminate the contract for future purposes, then none of the parties will owe further services and they have to settle accounts with respect to services performed before the time of termination. In order to avoid subsequent disputes, it is practicable to provide for these settlement issues in the agreement pertaining to the termination.

If the parties, by mutual agreement, terminate the contract with retroactive effect to the date when it was concluded, this action is called the cancellation of a contract. In the case of cancellation of a contract, the services already performed shall be returned. If the services cannot be returned (e.g. when half of a building has already been completed), in this case it is impossible to restitute the original status, and the contract may not be cancelled, so it can only be terminated for future purposes with a simultaneous obligation for the settlement of the accounts.

1.2. Termination of a contract by unilateral act

The other option for terminating a contract is when one of the parties terminates the contract by making a statement to the other party, or withdraws from the contract.

In the event of cancellation, the contract will cease to exist for future purposes – similarly to the case described above, in Clause 1 –, while in the event of withdrawal, it will cease to exist with retroactive effect to the date when it was concluded. The obligation for the settlement of accounts, and – in the event of withdrawal – the obligation of returning the services will rest with the parties the same way as in the event of a mutual agreement as described in detail in Clause 1 above.

The right of withdrawal or cancellation can be due to the parties on the strength of law or on the basis of a contract. If, in a given case, such right of withdrawal or right of cancellation is not stipulated either by the strength of law or by a contract between the parties, then none of the parties will have the right to terminate the contract by unilateral act, and termination will be possible by a mutual agreement of both parties only.

On the strength of law, there are basically two kinds of cases when termination may take place: one of them is termination by notice, when one of the parties terminates typically long-term legal relationships, typically by taking into consideration a notice period.

The right of termination without notice may be due to one of the parties in the event of an infringement of the contract. The right of withdrawal will be due to the party in the event of a delay of the other party, for instance, or in the event of a lapse of interest at the party that suffers a breach of contract (in other words, when the performance is not any more in the interest of the given party), or in the event of a lack of conformity in the performance,

if the obligor refuses to provide repair or replacement or is unable to fulfil that obligation within an appropriate time limit, or if repair or replacement no longer serves the obligee's interest. However, the obligee is not entitled to withdraw from the contract if the lack of conformity is minor.
An important institution in the Civil Code is the so-called premature non-performance, which says that if it becomes obvious before the contracted date of delivery that the obligor will not be able to effect performance as due, on account of which performance is no longer in the obligee's interest, the obligee shall be entitled to enforce his rights stemming from late performance – in this scope he may even withdraw from the contract or may cancel the contract. Similarly, these options are also available if it becomes obvious before the contracted date of delivery that performance cannot be effected as contracted, and the deadline for repair or replacement passes without result.

Special reasons for withdrawal/cancellation can be found also at the various contract types in the Civil Code.

3. Special rights of withdrawal in the event of construction contracts

In the meaning of Section 6:249. § of the Civil Code, the customer shall be entitled to withdraw from the contract at any time before the beginning of performance, and shall then be able to terminate the contract before performance (general right of withdrawal). In such event, the customer shall pay the commensurate part of the stipulated contract price and shall pay compensation to the contractor for damages. However, the amount of such compensation may not exceed the contract price. If the customer wants to exercise this general right of withdrawal/termination, then it is practicable to make a reference thereto in his termination, because, in this case, the customer is not obliged to give reasons for his termination, not even a breach of contract by the contractor is necessary for the validity of such termination.
Under the Civil Code, it will be the contractor who shall be entitled to withdraw from the contract if he receives unreasonable or unprofessional instructions from the customer, and if the customer insists on his instructions in spite of the contractor's warning. In this case, the contractor may, of course, decide to carry out the works according to the customer's instructions, at the customer's risk – the right of withdrawal is just an option.

The contractor will also be entitled to withdraw from the contract, if the customer fails to make available the work site in spite of being asked to do so by the contractor. In this case, the contractor may demand compensation for damages from the customer.

As we have seen, the right of withdrawal or the right of termination is ensured to the parties generally, on the strength of law, or on the basis of the various contracts. So, these questions must be regulated by the parties in the contract only if they want to deviate from the provisions of the Civil Code, or when they want to concretise those in some way. For the sake of clarity, it would be appropriate to specify those cases in the contract, when one of the parties will be entitled to terminate or to withdraw from the contract in connection with a breach of contract by the other party (e.g. the contractor will be entitled to withdraw from the contract when the customer is in delay with his payment obligations for more than x days; the customer will be entitled to withdraw from the contract when the sum of the penalty for late performance stipulated for the contractor has reached the maximum amount, etc.).

4. Advantages-disadvantages

In our opinion, in the contract it may be appropriate to indicate the circumstances giving rise to a withdrawal from or termination of the contract, but it is strongly recommended to do it by way of giving examples only, as otherwise there may be cases missing from the list, and on this basis it may be disputed between the parties whether a breach of contract that had not been specified in the given contract would be eligible to serve as a basis for termination.

5. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Sections 6:123.§, 6:251-252.§, 6:151.§;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.)

Language of the contracts

1. Concept and characteristics

The Hungarian law does not stipulate it mandatorily that works contracts or construction contracts must be written in the Hungarian language. It is therefore not excluded that a contract with a foreign party could eventually be made in a foreign language or perhaps in the language of both parties to the contract.

When the language of a contract is determined, attention must be paid to the following provision of the Civil Code: „ *If the issuer of a document containing his statement cannot read, or he does not understand the language in which the document is made out, the written legal statement shall be considered valid only if the document contains any evidence to suggest that the issuer was educated as to its contents by either of the witnesses or the counter-signatory."* The lack of this requirement, as a ground for invalidity, may be invoked in favour of the declarant person only (e.g. when a customer from Germany concluding his contract in the Hungarian language later contests his contract because he does not understand the Hungarian language).

In the light of the foregoing, in the case of foreign contracting parties, it is more appropriate to draw up bilingual contracts and, in this case, it should also be specified among the general provisions of the contract, which language shall be the one in which the contract shall be construed, and – in the event of a contradiction or discrepancy between the two language versions – which language-version shall prevail and which is for information only.

For the case of possible future disputes, and in order to facilitate the enforcement of rights, it is important to stipulate that the governing language shall be the Hungarian. It is also appropriate to specify the contractual provisions so, that the language of the contract, the language of the court to act in the event of a dispute, and the language of the law applicable in the event of a dispute should be the same.

It should be noted that in the case of civil law contracts relating to national assets in the area enclosed by the border of Hungary, as a main rule, only the Hungarian language can be stipulated as the governing language, in order to ensure the protection of national property.

2. Advantages-disadvantages

In the case of foreign parties, it is advisable to enter into bilingual contracts and at the same time to agree on the governing version for the case of a deviation.

3. Relevant major pieces of legislation

Act V of 2013 on the Civil Code, Section 6:7.§,
Act CXCVI of 2011 on national assets, Section 17.§ (3).

Rules for use of the reserve funds

1. Concept and characteristics

Among other things, Section 3 (2) of the Épkiv. specifies that construction contracts shall include detailed rules for the use of reserve funds if the parties stipulate a reserve fund in order to provide cover for extra works.

1.1. Reserve funds in public procurement

A reserve fund is a legal concept known mainly from contracts within the scope of public procurement procedures, which, in the cases of procurement and works covered by the Kbt., is governed by Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects.

When using a reserve fund, the rules for the use of the reserve fund and the amount of that use have to be specified in the terms and conditions of the contract. The amount of reserve fund can be maximum 10 per cent of the total amount of the consideration for the contract, and can be used only for the settlement of the amount of the consideration for works for the performance of the construction works necessary for the safe and proper use for the intended purpose.

From the point of view of public procurement, the point of stipulating a reserve fund is that, under the Kbt., the use of the reserve fund will not entail a need for any amendment of the contract or the conduct of a new public procurement procedure, and the implementation of the works (typically extra works) arisen subsequently can be debited to the reserve fund. It is a kind of guarantee rule to prevent the circumvention of public procurement procedures, and this is why the options and financial conditions for the possible use of a reserve fund have to be specified clearly in the contract, and in such a manner that every tenderer can get acquainted with that in advance.

1.2. Reserve funds in other contracts

The use of reserve funds is common not only in public procurement but advantageous also in contracts concluded with private customers, because it accelerates and eases claim enforcements, furthermore it reduces payment risks if up to the amount of the reserve fund, the customer gives the same security as that for the basic contractual amount.

It is important that the rules for the use of reserve funds, in particular the following, be stipulated in the contract:

- the scope of works chargeable to the reserve fund: the costs incurred in connection with extra works and additional works which could not have been foreseen by a specialized company (contractor) acting with due care at the time of conclusion of the contract;

- method of making the notification about the works chargeable to the reserve fund, and date of starting works;
- the technical inspector's rights in relation to the technical contents and bill of quantities of works chargeable to the reserve fund;
- approval.

2. Advantages-disadvantages

By means of the mechanism defined by the parties, the parties can more smoothly settle with each other and pay the amount of consideration for possible additional works and extra works if they stipulate a reserve fund.

3. Relevant major pieces of legislation

Section 6:244-245 of Act V of 2013 on the Civil Code;
Section 3 of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Épkiv.);
Section 20 of Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects.

Performance

1. Concept and characteristics

In exact legal sense, performance as a concept means contractual execution of the contractual obligations of the contracting parties. It is an important rule that in the course of performance, the contracting parties are obliged to cooperate under Civil Code 6:62 – this has special importance in connection with the performance of construction contracts (due to the long lead time, significant cooperation requirement, complexity, and the especially high value of the buildings or structures created by the performance of contracts).

Accordingly, it is of primary importance when the contract related to the construction can be considered to be fulfilled by the parties, i.e. the time when the legal consequences related to performance become effectual, like for example the issuance and settlement of the final invoice, the start of commercial guarantee period, etc. This may be linked to a successful acceptance procedure, or to the elimination of the defects found in the course of the acceptance procedure, etc.

a) Technical transfer and acceptance procedure

The building contractor generally fulfils its contractual obligations by a successful (technical) acceptance procedure; the rules of which are specified in Civil Code 6:247, in Étv, Act LXXVIII of 1997 on the development and protection of the built environment, and in the Épkiv as well. It is important that the parties in the relevant contract do not renounce the application of the mentioned Civil Code section (which, due to its nature, is dispositive), because in that case the building contractor's conditions for the acceptance procedure may become more disadvantageous, and the contract may lose its balance in this respect.

Pursuant to Épkiv., *„the purpose of the acceptance procedure is to examine whether the construction activity or technological installation according to the subject of the construction contract between the client and the main contractor has been fully realized pursuant to the contract and the law, is in accordance with the construction documentation, and the performance is in compliance with the prescribed technical requirements as well as other requirements and characteristics undertaken under the contract."*

Due to the nature of project activities and/or production in construction industry, in many cases, also the actual activities of the customer are necessary in order that the conditions of a successful acceptance procedure be given, like for example the conclusion of the final public utility contracts, the installation of meters, etc. It is important, therefore, that the contract also stipulate the dates and conditions under which the customer is obliged to provide these.

It is important to know also that, according to the Civil Code, if the customer fails to carry out the procedure of acceptance or verification, the legal effects of performance shall take effect upon the actual transfer of possession. This provision which protects the contractor is applicable in cases when the customer – presumably in bad faith – does not accept the works, but starts to use it actually. Thus, in these cases, the legal effects of performance formally have not taken effect, but according to the legislator, the performance should be regarded as if it were made.

In several cases, special conditions are associated with a successful acceptance procedure, for example the contractor is obliged to beforehand train the customer's operating personnel for the use, handling, maintenance, etc. of the works made. It is important that these obligations which are to be fulfilled by the contractor (like for example those which are in connection with the customer's personnel, such as what number and composition of operating personnel and at what time should be available at the site, etc.) be clearly stipulated in the contract.

It is a condition of successful acceptance procedures that the completed works could be used for their intended purpose – but defects which, in the case of repair or replacement, do not prevent proper use are allowed. Carefully worded contracts should also refer to the elimination of defects and deficiencies, e.g. the lead time of these, the method of calculating depreciation due to non-repairable errors, the tests in the event of repeated acceptance procedures, etc.

b) Occupancy permit

In many cases, the condition stipulated by the customer for the performance of the relevant contract is not a successful acceptance procedure but the conclusion of the occupancy procedure of the building or structure. If the design (of works) and construction is realized within the framework of one contract (i.e. the case of main contracting or quasi-main contracting), then this expectation of the customer can be well-founded in many aspects; it is, however, not so well-founded in the case when the customer wants that as the conclusion of a "simple" general contracting work. If the contractor accepts this performance criterion, then the time requirement of the occupancy procedure obviously has to be taken into account when calculating the time limit of performance.

The demand by the customer that the contractor is to fulfil the performance of the contract by a legally binding (final) executory occupancy permit can be phrased as a clearly unbalanced commitment stipulation – because in that case the contractor's performance is bound to conditions which the contractor in many respects cannot control or have an effect on (e.g. delays due to appeals, shortcomings of the customer's obligations in this regard, etc.) – and this performance condition together with these unknown factors can be expected to generate serious disputes.

c) Construction works, granting possession of the work site

Contract performance by granting possession of the completed building or structure can also give rise to many disputes. This act provides the customer the actual possibility that completed works will actually be at his disposal – and the last security for the contractor to back up the settlement of his possibly existing dispute with the customer. We recommend that contract performance should be bound to successful granting possession only if the parties will fully comply with the relevant pieces of legislation – namely:

- Section 6:247 (5) of Civil Code, i.e. *„If performance of the contract requires the contractor to transfer ownership of a thing, ownership shall pass to the customer when the thing is delivered and when the price is paid in full";*
- and Section 33 (1) of Épkiv., i.e. *„after the elimination of the defects and deficiencies arisen and recorded in the report during the technical transfer and accepting procedure, issuance of the performance certificate, and receipt of the value of the invoice issued on the basis of the performance certificate, the main building contractor shall deliver the work site to the client, and ..."*

(see in connection with that also the entries of Acceptance and Final invoice).

As it can be seen, both of these basic pieces of legislation connect the handing over of the completed building or structure to the customer with the payment of the value of the consideration, and therefore it is absolutely necessary that the building contractor who perform the contract by granting possession take due care and connect its above commitment to appropriate and proportionate payment guarantees.

2. Advantages-disadvantages

It is important that the parties should be aware of their rights when making their agreement in the contract on the exact date and conditions the occurrence of which make the performance effectual. In the course of this, they should consider carefully what the work processes which they can control are, and what guarantees they will have if, in spite of their contractual performance, their final invoice will not be settled.

3. Relevant major pieces of legislation

Section 6:62 and 6:247 of Act V of 2013 on the Civil Code;
Section 32 and 33 of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry.

Expert body for the certification of performance

1. Concept and characteristics

The Expert Body for the Certification of Performance (TSZSZ), which operates as an independent organization attached to the Hungarian Chamber of Commerce and Industry, was established on the basis of Act XXXIV of 2013 and Government Decree 236/2013 (VI. 30.) in the summer of 2013.

Proceedings of TSZSZ covers construction works carried out in Hungary.

The TSZSZ is entitled to examine construction contract performance, and issues expert's opinions and abstracts, on the basis of which it can be established whether a contract has been performed, or has been performed not in accordance with the contract and, in that case, to what extent the payment of the amount of consideration due for the performance of the contract – or of the enforcement of an additional liability securing contract performance, as the case may be– is justified.

It is important to know that the opinion of the TSZSZ can be requested also for the enforceability of the additional obligations securing the contract if the issue of enforceability is disputed between the parties. The additional obligations securing the contract in the cases the proceedings of TSZSZ can be requested are: guarantee, lien and suretyship.

As a main rule, the TSZSZ acts by a council consisting of 3 members. 30 and/or in certain cases 60 days are available for the TSZSZ to make its expert's opinion. The fact that the expert's opinion fee of the TSZSZ (1 per cent of the disputed value, min. 60,000 HUF but maximum 450,000 HUF) is significantly less than the market price of an expert's opinion is also worth considering when calling in the TSZSZ.

It is important to know that the contractual stipulations which exclude or limit TSZSZ proceedings, or which attach negative legal consequences to the initiation of TSZSZ proceedings are to be deemed null and void.

It is also extremely advantageous to the parties that the court proceedings which are based on the expert's opinion of TSZSZ take priority over other cases at the court, i.e. the time limit of these court proceedings is less, and these cases may be closed within a much shorter time with a final judgment than others. It also serves the equitable economic interest of the parties that, upon petition, the court – on the basis of the available documents, and without hearing the parties – orders, by an interim measure, the court presidential deposit of the amount included in the claim (counterclaim) and/or the petition for interim measures which, according to the expert's opinion of the TSZSZ, with absolute certainty is the establishable contractual value of the works performed.

Please note that with the agreement of the Banking Association an the ÉVOSZ, the TSZSZ issued a Guideline, prepared in April 2016, for the procedures to be applied in the case of disputed enforcements of bank guarantees related to construction works, which Guideline is worthwhile to study and follow for all those involved in such cases. Accordingly, if the contractor disputes the validity of a claim, he may turn to the TSZSZ for the purpose of investigating the contract performance of the primary legal relationship. The TSZSZ notifies the financial institution of the submission of the application, and the financial institution is entitled to defer performance for the announced claim until the acceptance of the application has been evaluated, and/or until the expert's opinion has been prepared, i.e. the financial institution will not be in delay under the Civil Code, thus the legal consequences of delay during the above period cannot be enforced against him.

In its expert's opinion the TSZSZ determines either that the enforcement of the bank guaranty was justified (an in what amount), or was not justified, or was in part justified from a technical expert's point of view. The financial institution will decide on the payment or the refusal of that in knowledge of the expert's opinion.

2. Advantages-disadvantages

On the basis of its few years of operation, this special institution of dispute settlement can be considered basically successful due to the fact that, in many cases, by using the TSZSZ, the disputing parties managed to resolve their disputes without court proceedings. Therefore, in the cases of disputed professional issues related to performance, we definitely recommend using the institution, which issues an expert's opinion against a favourable fee within a short time limit, and in certain cases even the court proceedings based on the expert's opinion may take priority at the court.

However, it is also important to emphasize that – when the parties use the opinion of TSZSZ for the enforcement of securities – there are neither pieces of legislation nor jurisprudence which determine how long the expert's opinion of the TSZSZ would prevent with legal effect the enforcement of a security and when the obligor's performance obligation would revive. This is because the expert's opinion of the TSZSZ qualifies neither for a court judgment nor for a binding decision of authorities. For this reason, in practice, the question often arises as how long an expert's opinion can prevent the use of a security and whether a security becomes enforceable if e.g. the court of first instance takes a decision contrary to the expert's opinion or that requires a final judgment.

3. Relevant major pieces of legislation

Act XXXIV of 2013 on the organization collaborating in the settlement of certain disputes related to the design and construction of buildings;
Government Decree 236/2013. (VI. 30.) on certain questions related to the Expert Body for the Certification of Performance
Section 6:436 of Act V of 2013 on the Civil Code

Declaration of completeness by the contractor

1. Concept and characteristics

The customer often request the contractor's declaration of completeness in construction works tenders or contracts. This document generally refers to the fact that the contractor's fee agreed with the contractor includes all the costs of the complete implementation of works. This declaration may typically be relevant in the case of contracts where the parties agreed on a fixed sum, since otherwise the contract price is to be paid according to an itemized settlement, and the contractor shall be entitled to invoice for the work phases actually arisen and completed.

The definition of a declaration of completeness cannot be found in any pieces of legislation, even the legal consequences related to this declaration can not be quite clearly determined. A declaration of completeness may be relevant basically from the point of view of which party bears the costs of additional work. Pursuant to the Civil Code some work is to be considered to be additional work when it is covered by the construction contract but has not been taken into consideration for the calculation of the contract price, as well as the work that is considered essential for the completion of the works in a condition proper for use or intended purpose.

That is because Section 6:245 (1) of Civil Code declares that if *„the parties agreed on a fixed sum, the contractor shall have the right to charge for extra works only in addition to the fee agreed upon, and shall not be entitled to charge for additional works. However, the customer shall reimburse the contractor's expenses incurred in connection with carrying out additional works, which could not have been foreseen at the time of conclusion of the contract."* Thus, if the parties stipulated a fixed sum, then according to the main rule, the contractor cannot claim foreseeable consideration for possible additional works anyway – i.e. not even without a declaration of completeness – because they are part of the contractor's risk. At the same time, it may be questionable in a particular case whether the parties' declaration of completeness was also intended to exclude the customer's claim for reimbursement in respect of the last paragraph of the above section of the Civil Code, i.e. in the case of costs which were not foreseeable at the time the contract was concluded.

Although customers' endeavours to have a guaranteed fixed sum agreed may be reasonable in order to exclude contractors' concealed fee increases, but a too general and inaccurate wording of the declaration of completeness may give cause for the rejection of remuneration for unforeseeable technical elements as well as for disputes between the parties. Due to these reasons – and to avoid later disputes –, and in order to make the contract balanced, it is definitely reasonable to phrase it clearly and unambiguously in the contract itself how the parties are to settle the costs which could not have been foreseeable at the time of conclusion of the contract.

2. Contents of the declaration of completeness

In view of the above, it is very important that the parties should record the declaration of completeness with due accuracy, and really in accordance with their contractual will – and if it is possible, do that in the contract and not in a separate document. General phrasings may give rise to serious disputes between the parties. If, however, the parties want to record this declaration in a separate document, then it is absolutely necessary to define clearly the technical contents the agreed fixed price refers to. It is particularly appropriate to state clearly the following:

- data on the given construction/project,
- design phase, the status of the plans,
- state of technical contents,
- time for completion.

It is important to state that the declaration of completeness refers to the contractual technical contents stated by the contractor in his last tender as the technical contents, or which has attached to the contract as an annexe.

It is especially recommended to avoid such general terms in the declaration such as *„according to the technical level of the age"* or *„accepted in the given period".*

When drawing up a declaration it should be made sure that the price really includes all the costs of the implementation, and we can be quite sure in our evaluation of that fact, because the plans and the priced bill of quantities are detailed enough for that purpose.

3. Advantages-disadvantages

Making a declaration of completeness and by means of that transferring all costs of additional work to the contractor, creates a very unilateral and unbalanced position between the parties. It follows also from the general principle of good faith and fair dealing included in the Civil Code that the stipulation of this damage settlement rule – which does not take into consideration at all whether the given additional work could or could not have been foreseen with due care at the time of conclusion of the contract – is highly controversial in our view. Due to these reasons making a declaration of completeness is recommended only in justified cases, in a limited way, or not at all.

See also the entry of additional work and extra work.

4. Relevant major pieces of legislation

Section 6:244-245 of Act V of 2013 on the Civil Code;
Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry (Section 2 e) of Épkiv.).

Design tasks in construction contracts

1. Concept and characteristics

Construction works contracts are characteristically typical works contracts, but – due to the freedom of contract – the parties often agree on the performance of design tasks as well. Due to the special nature of design activity and the particularities of design contracts, in many cases these constructions may pose a serious risk to business parties less experienced in designing.

Pursuant to the Civil Code the design documentation shall feature technically and economically feasible and otherwise efficient solutions, and shall be appropriate for satisfying the customer's needs which can be identified and which are considered to serve the intended purpose. Furthermore, the Étv. and the Épkiv. specifies that the contracts related to architectural-technical design shall be concluded in writing, thus a verbal agreement between the parties is not sufficient in this case.

A designer can employ an associate designer and/or specialist designer only in the case and manner specified in the contract – therefore, in a given case, it is absolutely necessary to settle this issue in the contract. It is also important to know that on the grounds of design defects the rights stemming from non-performance may be enforced insofar as any right exists on account of lack of conformity attributable to defects in performance arising from discrepancies in the design. The contractor who undertakes designer's tasks shall guarantee that no third person has any right that can prevent or restrict the use of the design.

Government Decree 266/2013. (VII. 11.) on the professional activities related to building and construction matters requires that a company may start and continue a design activity specified by law only if a personally collaborating member, an executive officer, or an employee of the company has such an entitlement for designing.

2. Types of design tasks

2.1. Product design

The most common design task of a constructor is the designing of products, which is design work necessary for the precise production of individual products. Professional constructors employ skilled designers who know their profession well. In the course of product design no work can be carried out which modifies the construction drawings or solves the deficiencies thereof, rather, it only makes the data necessary for production more accurate.

2.2. Design of works

A modern form of entrepreneurship is a construction company, specified within the framework of a so called functional notice, which integrates into itself the design of works as well. In this case the client is exempted from the risks inherent in technical details, because he specifies only the form and quality of the building without its details. In this case the task of designing works, together with all the risks and possibilities of that, is on the contractor's side. In this construction, the client's main interest is to specify exactly his expectations, concerning the building, in the contract.

2.3. Design and build

When concluding contracts of the design-and-build type, it is recommended to analyse thoroughly the risks which are to be treated subsequently, or to use an already developed contractual method (e.g. the FIDIC Yellow Book).

3. Risks of design tasks

When undertaking work and time limit obligations, the uncertainties of licensing procedures – like for example the circumstances which impede and delay the final permits coming into force e.g. appeals – must be taken into account.

It should be also noted that, according to the Étv., the obtaining of permits is the client's task; the contractor can act only as an attorney. It may be also practical to stipulate in the contract the case of what happens if for some reason the authorities refuse to grant the permit which has been applied for.

During design processes, cooperation between the parties, and especially the supply of data by the customer, is of paramount importance. Failure to do so or delay in doing so may result in significant risks in terms of performance. Inaccurate or delayed data provision can lead to protracted designing, as well as disputes between the parties.

Accurate documentation should be made when receiving data; − and writing is indispensable in this context.

If design work is integrated into the contractor's tasks, i.e. the technical solution needs to be designed and adapted to the environment, it may easily happen that the solution changed due to contract amendment can not be designed. In this case, the whole risk is on the contractor's side if the contract is a fixed-sum contract.

Design processes should be started in due time because they can take a long time due to the nature of the activity. To have the designs approved by the client may be a time consuming and cumbersome process, but obviously no objections can be made against the customer's wish to inspect an examine the final designs on which the construction is based. Therefore, in order not to delay time for completion, the parties should strive, in good faith, to finish this process smoothly and as soon as possible within the time frame agreed by the parties. Efforts should be made to document thoroughly the approval of the designs.

We should not forget that every engineering service has a price, that is, if the contractor carries out design tasks as well, he will obviously charge the customer a fee for that.

It is an important consideration in connection with design tasks that the process is difficult to be *"sliced"* since the essence of this intellectual product, the design concept, is already formed at the beginning of the process as regards the activities of both the (general) designer and the specialist designers. Therefore it may be appropriate to stipulate the following:

- if at a certain point of the design process the customer decides to stop or interrupt the design works, the designer may be entitled to the whole amount of the remuneration contracted, in accordance with the settlement between the parties – in this case, however, we consider it fair that the designer hand over the already completed designs, author's works to the customer in order that the customer be entitled to modify or complete the designs himself or have that done by others;
- if, by a detailed programme or milestones, the design work has been broken down to logical units or subtasks (e.g. building permit drawings, construction drawings, statics, architecture, etc.), the designer shall be entitled to the designer's fee of the smallest ongoing unit which has been started and is interpretable in itself.

In view of the above, and also with regard to the generally applicable Section 6:249 of the Civil Code, we recommend that, in the case of the customer's withdrawal from or termination of the contract, the fee payable to the designer shall always be commensurate with the completed design work and the damage caused by the termination of the contract.

4. Advantages-disadvantages

It can be advantageous and simpler for the customer if the contractor undertakes certain design tasks and the parties do not have to involve a separate designer in the process.

Also the world of construction moves in the direction that companies, even in the interests of using their own technologies, undertake independent design tasks in their construction contracts, and this is obviously reflected in their remuneration. It is important, however, that in these constructions both parties be aware of the importance of cooperation, the individual risks involved and their consequences. In order to achieve this, the parties' obligations and responsibilities in the contracts must be defined in as much detail as possible.

5. Relevant major pieces of legislation

Section 6:251 of Act V of 2013 on the Civil Code;
Section 32-33 of Act LXXVIII of 1997 on the formation and protection of the built environment;
Section 9 of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry; Government Decree 266/2013. (VII. 11.) on the professional activities related to building and construction matters;
Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects.

Additional work and extra work

1. Concept and characteristics

It is a well-known fact that due to the long lead time and complexity of production processes in the construction industry, and the technical complexity and specific nature of the building or structure created, almost every construction project entails also some unforeseeable new tasks, i.e. tasks which could not have been foreseen at the time of conclusion of the contract but have to be carried out in the course of the construction. These are typically the additional works or extra works, which usually generate (settlement) disputes between the customer and the contractor. Unfortunately the legislative activity of recent years does not help to resolve such disputes: the general and specialized regulations are not clear; the exact contents of additional work and extra work yet needs to be specified in the course of practice.

In relation to this, the Civil Code provides as follows:

„Section 6:244 [Additional work. Extra work]

(1) The contractor shall perform the work covered by the works contract but not taken into consideration for the calculation of the contract price, as well as the work that is considered essential for the completion of the works in a condition proper for use or the intended purpose (additional work).

(2) The contractor shall perform works ordered subsequently, prompted, in particular, by changes in the plans or designs, if carrying out such works is unlikely to impose unreasonable burden upon the contractor (extra work).

Section 6:245 [Contract price]

(1) If the parties agreed on a fixed sum, the contractor shall have the right to charge for extra works only in addition to the fee agreed upon, and shall not be entitled to charge for additional works. However, the customer shall reimburse the contractor's expenses incurred in connection with carrying out additional works, which could not have been foreseen at the time of conclusion of the contract."

These are dispositive provisions, i.e. they bind the contacting parties only if they have not agreed otherwise; at the same time, the provisions of the Épkiv. are cogent, i.e. mandatory provisions, the relevant of which are as follows:

„Section 2 For the purposes of this decree

e) additional work: an item demonstrably existing in the (tender or construction) documentation which constitutes the basis of the contract agreement, and is included in the priced, itemized bill of quantities made by the building contractor, and the quantity of which increases due to unforeseeable technical necessity,

f) extra work: an item which is not included in the documentation which constitutes the basis of the contract, and which is an item ordered separately due to unforeseeable technical necessity,

Section 3 (2) The construction contract includes

j) the settlement method of the extra work which potentially may arise in the course of carrying out the construction activity in the construction industry,

……..

p) the detailed rules for using reserve funds if the parties stipulate reserve funds in order to provide cover for extra work,

……..

(8) Additional work can be settled subsequently only if the item has been included in the priced and itemized bill of quantities.

(9) In accordance with the contents of a related separate agreement, the contractor is obliged to carry out the additional work which is necessary due to technical necessity or proper and safe use for intended purpose."

On the basis of the quoted terms, serious interpretation disputes may be pursued e.g. on whether the construction-installation task is extra work if it has been ordered by the customer but not due to technical necessity, but rather it reflects changes in the customer's requirements; and the provisions concerning how the consideration for additional work can be settled in the case of a fixed-sum contract are highly controversial as well.

It should be also noted that, in addition to these, a further cogent piece of legislation provides for public sector orders and contracts: Act CXLIII of 2015 on public procurement. Section 141 of this deals with the questions of contract amendment; we cannot find in it, however, the concepts of extra work and additional work and/or the phrase of technical necessity − this section applies for the contract amendment options of contracts concluded as a result of public procurement procedures, and, from the point of view of public procurement, makes justified contract amendments clearly possible, obviously including in that also the justification for additional works and extra works. In addition to this, the Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects also plays an important part in this context; its Section 20 regulating the use of reserve funds included in construction works contracts provides as follows:

„(3) Reserve founds can only be used for the performance of construction works, for the settlement of the consideration amount for works necessary for the safe and proper use for the intended purpose..

…..

(5) Reserve funds can also be used in order to carry out works which become necessary in the course of the performance of the contract, and are pursuant to Section 6:244 (2) of Act V of 2013 on the Civil Code, if the works are in compliance with Subsection (3).

However, we would like to draw your attention to the fact that the legislation emphasizes: the contractor is obliged to carry out the additional work and extra work necessary due to technical necessity and/or safe and proper use for the intended purpose; the said extra works shall be carried out if carrying out such works is unlikely to impose unreasonable burden upon the contractor. If carrying out these works makes the undertaken task unreasonably burdensome, the contractor is not obliged to carry them out.

In our view, when concluding construction contracts in this somewhat ambiguous legal environment, the contractor acts with due care

- if, in the contract, he does not renounce the application of the above mentioned Civil Code provisions, i.e. Section 6:244 and 6:245, because with that he restricts the possibilities of settling the consideration amount for the potentially arising additional works and extra works;
- if the other party definitely insists that the above sections of the legislation be ruled out and/or he does not want to reimburse consideration for any additional works, it may be justified to increase the tender (contract) price due to the increase of the related risks;

- if he carries out the tasks which he considers to be additional works and which have to be carried out due to technical necessity and the safe and proper use for the intended purpose, to the extent which does not make his originally undertaken tasks unreasonably burdensome in respect of the contract price, time limit for completion, lead time, and other conditions,
- if, at the same time, he calculates the consideration amount for these tasks and the impact of these tasks on time limits and other relevant conditions in a precise and well-founded manner, and officially informs the customer about these as soon as possible and does not relinquish his claim.

Its should be also noted that, in our expectation, the discrepancy between the provisions of Civil Code and Épkiv. is going to be resolved by the correct application of the law and judicial practice – presumably in such a way that the provisions of the Civil Code which are higher up in the legislative hierarchy get priority over the unjustifiably restrictive stipulations of the Épkiv.

We also draw attention to the fact that these works often entail cancelled works in relation which see the entry of *„Change management"*.

2. Documenting additional work and extra work

In addition to our recommendations for the conclusion of contracts, in this entry, we deal with a topic relevant to the subject, but which is mainly relevant in the phase of contract performance. The already quoted Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry provides as follows:

„Section 24/A (5): In the e-building log,

a) the main contractor, general contractor shall immediately notify the client about the technical necessity for additional work and extra work,

b) the client shall immediately notify the main contractor, general contractor about his requirement for additional work and extra work."

In practice, it rarely happens that way; the most common is verbal communication. According to the experience of experts and judicial practice it is definitely practical for the contractor to make a written notification, simultaneously with or within the shortest possible time after making the above notifications, in relation to

- what justifies the given modification (naturally, only if it is not about a contract amendment, because it is quite clear in that case),
- if he considers the given performance to be additional work,
- whether the performance of the indicated work involves the modification of a price or time limit stipulated in the contract, and, in the affirmative case, what the amount of that is.

If the contractor does not indicate these in due time, the other party may assume that the contractor has undertaken to perform the relevant work without the modification of the price and the time limit given in the contract.

Several subsequent disputes can be prevented by due documentation – although, obviously, all the disputes of the process, and especially the ones like these, cannot be excluded completely, but written documentations (or the lack of them) may be a decisive factor in potential court proceedings.

3. Advantages-disadvantages

Several times serious disputes arise in connection with the contractual terms which *"become unreasonably burdensome*" due to additional works and extra works – the response to these by a contractor acting in its own legitimate interests can only be that he takes an accurate and objective account of these works, and gives official notifications about his claims and the reasons for them.

In many cases, the settlement of these types of works finally leads to legal proceedings – but even in these cases, it should be emphasized that the parties have a valid obligation to cooperate in order to perform the contract: the construction and performance of the works to be implemented is in the best interest of both bona fide parties.

4. Relevant major pieces of legislation

Section 6:244-245 of Act V of 2013 on the Civil Code;
Section 141 of Act CXLIII of 2015 on public procurement;
Section 2 €, f), 3 (2) j, p), (8)-(9) of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry;
Section 20 (3), (5) of Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects.

Programmes as important annexes to construction contracts

1. Concept and characteristics

The time for completion and the related complex system of conditions are probably the most important elements of building construction contracts. The means for working out this complex system of relations in detail are the programmes, in which, many other elements of these relations can also be specified in addition to time limits. In accordance with that, also Section 3 (2) of the Épkiv. requires that performance phases and time limits be regulated in detail in construction contracts.

In the following, we intend to explore the connection between programmes and contractual conditions, as well as the building contractors' risks inherent in some of these relationships.

2. Programmes as inseparable parts of construction contracts

The building and construction contracts usually include programmes in which, in addition to the simple data recording of the time for completion, also many other important pieces of information may be recorded, in particular:

a) Workflows and their capacity- and time-requirements:
The necessary workflows and their capacity-requirements can be recorded in various detail in programmes. The time requirement of a given workflow depends on the available capacity and the amount of work to be carried out. This is the end result of a conscious planning to create the optimal requirement for capacity and working hours at a given cost level.

b) Time and space flows of workflows:
Programmes are usually suitable to demonstrate also the time and space situation of workflows.

c) Relationships of workflows:
There are relationships and connections between individual construction sub-processes, which form a complex process related in space and time in the course of the construction.

This system of relations is well-defined by professionals, and therefore the construction process can be demonstrated well in programmes, and in that way, the building contractors' major risks in relation to time limits can be indicated.

3. Risk elements demonstrable in the programmes

a) Deadline for the transfer of the work site:
Every construction process starts with the taking over of the work site, and therefore, it is necessary to specify that by a date or a milestone exactly. This fact shall be recorded in the e-building log as well.

b) Recording the deadlines for the provision of data:
In the programmes, it is possible to record milestones the customer's performance of which is crucial for the contractor's compliance with deadlines. Such are e.g. the handing over of plans, the client's decisions, making approvals, etc. In the event of the delay of these, interim breach of contract may occur on the part of the customer if the failure to make the given statement or take the given measure will exclude the proper performance of the contractor (Section 6: 150 of the Civil Code).

c) Specifying interim deadlines:
In the programmes, it is possible to record important interim milestones necessary for the construction or further construction, such as completed main structure, closed, rainproof building, start of technological pre-assembly, etc. The indication of such milestones helps to control the construction process, but in many cases these also entail paying contractual penalty if compliance with the given deadlines is in the special interest of the customer (e.g. they want to start the technological installation work in a closed, rainproof building, etc.). If the parties agree in this way, then in certain cases, it may be fair to waive the penalty claims related to interim deadlines if otherwise the contractor complies with the final deadline. Naturally, the same provision cannot be expected in the event if compliance with the final deadline does not make good the delayed interim deadline (e.g. the technological installations could not be started indoors).

d) Representing the processes on the critical path:
After making the connections of constructional sub-processes, the processes on the critical path can be represented. It may be practical to look at these in order to know the delay of which process leads automatically to the shift of the final deadline.

e) Accurate representation of the takeover procedure:
In many cases, customers and contractors have different interpretations of the final deadline included in the programmes. Therefore, it is practical to define accurately order of the courses of:

- the physical state of the completed building,
- the process of handover/takeover,
- the period for repairing the defects found,
- the date for the issue and payment of the final invoice,
- obtaining of the occupancy permit
- the final granting possession

in accordance with the pieces of legislation for constructions.

4. Advantages-disadvantages

Programmes are important parts of construction contracts. By clarifying workflows, many risk elements can be filtered out, and that gives contractors an advantage. Furthermore, in many cases, programmes provide an opportunity for the concretization of processes not dealt with in the works contracts.
In view of the above, it is definitely recommended that the parties – typically the contractor – should make and approve programmes that are properly detailed and worked out. It is also important that the programmes be prepared for the undertaken technical contents, and include realistic deadlines, which take into consideration realistic working hours in accordance with the seasons and the weather.

5. Relevant major pieces of legislation

Section 6:35. and 6:150 of Act V of 2013 on the Civil Code;
Section 3 (2) d) of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry

Change management and change tracking

1. Concept and characteristics

Due to the nature of the production in construction industry, it is an almost constant intrinsic characteristic of construction contracts and performance that changes and variations occur in the construction period. These changes can be very diverse – they can be initiated either by the customer or the contractor; the subject of changes can be technical contents, time limits, constructional or financial programming, and basically any of the contractual stipulations. The parties can handle these changes more easily and smoothly if they specify a way of procedure for that purpose in the contract beforehand; therefore, it is recommended to include, in construction contracts, procedural rules for handling such changes and their consequences.

The basic principle of handling and tracking of changes and variations is that both the customer and the contractor is entitled to initiate them and to bear the consequences for that in a given case.

Basically, a change or variation involves the amendment of the construction contract, for which the provisions of the Civil Code are applicable. Accordingly, any amendment of the contract is possible only with the mutual consent of the parties – except when the contract or some piece of legislation entitles one of the parties for the unilateral amendment of the contract.

A special case of these amendments is the amendment of technical contents of a contract concluded as a result of a public procurement procedure, because with regard to Section 28 (1) of Government Decree 322/2015. (X. 30.) on the detailed rules for public procurement of construction projects and of the design and engineering services related to construction projects:
„after the conclusion of the contract, the party entering into the contract as contracting authority and the party entering into the contract as the successful tenderer may carry out consultation in respect of the items of the priced bill of quantities, in the course of which they may finalize the individual items to be installed." The decree includes also a relevant stipulation pursuant to its paragraph (2): *„in the course of the consultation the parties can agree only on substitute products technically equivalent or higher quality than the construction materials and products specified in the tenderer's tender."* If the parties agree on the installation of a substitute product, the amendment of the contract can be implemented also without carrying out a new public procurement procedure.

In case of any modification of the contract, it is recommended that the final contract terms and the technical contents specified by denominations are clearly stated in the written amendment of the contract, as these are the contents the contractor undertakes to implement and the customer undertakes to accept by concluding the contract.

2. Contract amendments in general

In many cases, the customer initiates the variation, typically in relation to the technical contents of the contract; this may be due to various reasons: among other things, e.g. change in the customer's demands (and/or that of the interested parties in his sphere, e.g. tenants or end users, etc.), changes in the regulatory provisions prescribed by authorities, amendments of pieces of legislation or changes in other regulatory provisions (e.g. technical standards), correction of deficiencies and defects of design, problems with data supply (e.g. public utilities, soil contamination, etc.). It is recommended that the contract should clearly state the procedure to be followed by the parties in particular:

- by what technical documentation can the variation be initiated at the contractor,
- the period within which the contractor is to make a bid for that (including, where appropriate, the difference between the new and the cancelled content) and the relevant technical / financial programming proposal, and/or the impact of the variation on the contract as a whole,
- upon receipt of this, within what period of time the customer decides on the variation by ordering the variation at the contractor – or rejecting it and then the original technical content shall be implemented.

We recommend that the contract include provisions concerning on the basis of what conditions the contractor is to make its bid for the variation mentioned (norms, conditions, comparative prices of similar items, maybe on the basis of the unit price list or the overhead costs per hour attached to the contract, etc.). However, it is not uncommon for the customer to disagree with the bid given by the contractor, and the parties cannot agree on the amount of consideration for the technical content involved in the variation. For this case, we recommend to stipulate that the customer has the right to order this new work from another supplier or contractor, and then the given new contractor or supplier will be the original (contracted) contractor's partner (as a subcontractor or a supplier) by charging for the contractor's cover (margin).

An important aspect in managing the variations required by the customer is what technical and other relationships the given variations involve – it is a fundamental question whether the usability of the given building or structure changes as a result of the given variation, i.e. whether it will be in compliance with its original, i.e. contractual, intended purpose. This is a question the contractor should know the answer.

In many cases, variations are initiated by the contractor e.g. due to material procurement difficulties, lack of subcontractor's or supplier's capacity, value engineering of work organization or construction technology, and also in order to decrease lead time, etc. In these cases, the rules of proceedings are similar – the contactor has to submit programming, and a bid concerning the amount of consideration for the relevant new work, to which the customer has to respond in a substantive manner within the period of time specified in the contract.

In many case the customer requires the use of a formalized change tracking form, which usually corresponds to his own decision-making and approval mechanism; it is important that also the form of this should reflect the balanced relationship and equality of the customer and contractor.

Disputes very often arise between the customer and the contractor in respect of the qualification of the given variation: whether the given work is additional work or extra work. We deal with this question in a separate entry, but we call attention to the fact here as well that it is important to regulate in the contract how the parties shall act in the case of such a dispute. In addition to the rational business considerations of the parties, the Civil Code declares also the parties' duty to cooperate in the course of the performance of the contract, see Section 6:62 (1). In view of this, it is recommended that the parties do not allow, up to a reasonable limit, the impediment of construction works or let them have impeded for the reason of their dispute over the judgement of additional work. Accordingly, we recommend that, while maintaining their point of view related to the qualification of the nature of the given works (additional work/extra work), and the contractor's right to a settlement, the customer should order the given work in order to prevent major delays and the damage arising from that, and the contractor should carry out that work. The *"reasonable limit"* mentioned earlier may be, for example, the reserve fund of the contract – however, disputes over the nature of additional works which have already been performed and are of a greater value may pose an unreasonably high risk to the contractor.

In relation to variations, the case when the customer reduces the technical contents of the contract, i.e. the case of cancelled works also has to be mentioned here, and stipulated in the contract as well, because it is very important that the contract specify clearly

- until what date, during what period of time has the customer right for that without consequences, since these kind of variations may affect the materials and structures to be installed, specialist contractor's work and related other works which have already been ordered,
- at what price the parties will take into account consideration for these cancelled works.

In respect of the settlement of works affected by variations, it is recommended to take into account that the usual form of settlement of these works is itemized settlement; only clearly defined tasks are worth to be settled at a flat rate.

In the above, we concentrated on the changes and variations of the technical contents of the contract; naturally, the amendment of other contractual conditions is also very common, and provisions have to be made for these too when drawing up the terms and condition of a given contract. Typically common cases are for example the following:

- the amendment of technical programmes, deadlines and interim deadlines – due to the fact that the time period for price changes taken into account in the course of determining the contract price increases by the prolonged lead time; it is recommended to stipulate some price change index or method in the contract for the purpose of taking into account the additional lead time;
- the amendment of financial programmes – if the dates specified in the contract for issuing partial invoices change, or the date of advance payment changes, the parties have to take into count the effects of that; we recommend the introduction of an indexation method fixed to money market indicators;
- an additional contractor's entry to the work – the building contractor already on the work site is requested by the customer to comply with the work site and organizational needs of a co-contractor (e.g. a technology installer) who is usually entering the work by the direct order of the customer; it is recommended to settle the conditions of this (price, deadline, etc.) already at the conclusion of the contract;

– problems with the provision of the work site and organization – it often occurs that the customer modifies or is forced to modify some of the services or conditions he has undertaken to provide – if these are foreseeable, it is recommended to stipulate these conditions in the contract.

3. Advantages-disadvantages

Having regard to the fact that several unforeseeable circumstances may arise in the course of the construction which require the amendment of the contract, it is in the best interest of the parties to make the contract amendments which are necessary in connection with the changes and variations that occur in the course of the works. There is generally no civil law impediment to this, and this is made possible also by the Public Procurement Act (with simpler regulations than in the old version of the act) in the case of contracts concluded as a result of public procurement procedures. At the same time, it is important that the rules for cases requiring typical contract amendments are already specified in advance by the parties in the contract, and that they act in good faith and in cooperation with each other in the course of the modification.

4. Relevant major pieces of legislation

Section 6:191 of Act V of 2013 on the Civil Code;
Section 28 of Act CXLIII of 2015 on public procurement.

The final invoice

1. Concept and characteristics

The final financial step in construction works activity is the issuing and settlement of the final invoice and carrying out tasks related to the final invoice. The final invoice can be submitted when the contract has been fully performed. The issue of the performance certificate related to the final invoice is preceded by a report of completion and the technical handover/takeover procedure assigned on the basis of this report. The final invoice can usually be issued when the he defects recorded in the schedule of defects have been rectified and the performance certificate has been issued. In connection with construction contracts, the Civil Code declares that acceptance shall not be refused on the grounds of any defect in the works that, in the event of repair or replacement, does not prevent proper use. If the customer fails to carry out the procedure of acceptance or verification, the legal effects of performance shall take effect upon the actual transfer of possession.

2. The contractor's rights in connection with the settlement of the final invoice

Contractors are not usually familiar with the fact that the Épkiv. provides a significant opportunity to speed up customers' carrying out their tasks related to the final invoice and the payment of the final invoice. Section 33 of Épkiv. provides that when the defects, found in the course of the technical handover/takeover procedure, and recorded in the schedule of defects, have been rectified, and the performance certificate has been issued, and the value of the invoice issued on the basis of the performance certificate has been received, the main building constructor shall hand over the construction site, the construction and as-built documentation, and every other document necessary for obtaining the occupancy permit to the client. Having regard to the fact that the provisions of the Épkiv. are mandatory, from which the parties may not legally depart, any contractual stipulations contrary to that may be deemed invalid. If the contractors do not exercise their statutory right – i.e. they hand over the work site before the final invoice has been paid –, they waive a security that could have substantially promoted the customer's willingness to pay.

In the form specified in the contract, the security for good performance shall be provided for the customer usually at the same time as submitting the final invoice.

The settlement of the advance amount that has not yet been taken into consideration is an item also to be connected to the final invoice.

Until the submission of the final invoice, it is recommended to negotiate and agree on all customer's and contractor's claims, such as extra works, contractual penalty, possible damages, etc.

3. Advantages-disadvantages

The submission and settlement of the final invoice represents the closing of construction works, and therefore it is quite common that disputes arise between the parties in connection with that. Due to this reason, it is important that every contractor should be aware of the powerful right he has under the Épkiv. in relation to the restraint of the handover of the work site, by means of which he can enforce the payment of the rightful amount of the final invoice on the customer.

4. Relevant major pieces of legislation

Section 6:247 of Act V of 2013 on the Civil Code;
Section 54 and 54 and 134 of Act CXLIII of 2015 on public procurement;
Section 33 of Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry.

Settlement of disputes, the governing law

1. Concept and characteristics

In our view, due to the complexity of construction processes and the characteristics of production in the construction industry, technical disputes related to performance, and consultations on the interpretation of the documentations and the contract are intrinsic to construction processes. A well-prepared and drafted construction (works) contract must cover the constructive settlement of such disputes: some method for keeping them under control, rules of proceedings in relation to disputed issues, and the (external) tools to be used to facilitate agreement between the parties.

In the case of disputes related to the contract and/or the performance of that, we consider the provision of Act V of 2013 on the Civil Code a good starting point, according to which *„the parties shall be required to cooperate during preliminary negotiations, at the time of the conclusion and termination, and during the life of the contract, and shall be duty bound to communicate information to each other on circumstances relevant to the contract"*. Besides, this is in the best business interest of the parties, since many disputes can be prevented by the parties' communication in good faith.

1.1. The governing law

Any controversy arising from the contract needs to have a legal basis and, from this point of view, it is a fundamental question whether the contract is governed by Hungarian law or by some foreign law.

Hungarian legal entities are basically subject to domestic law. However, in private law relationships which include foreign elements, the parties are generally entitled to the freedom to choose their governing law. Customers with foreign jurisdiction in Hungary often endeavour to make the law of their country to be the basis of the contract, since they are more familiar with the provisions of that law. The stipulation that some foreign law be the governing law in the case of construction contracts in the building industry can be problematic due to the fact that the domestic law contains many mandatory provisions applicable for these types of legal relationships, and it is not possible to depart from these – not even if the parties have agreed on some foreign law as governing law. Therefore, in the case of construction contracts to be performed in Hungary, it is more practical and simple if the parties conclude their contract in accordance with Hungarian law. A similarly important stipulation between a foreign and a Hungarian party is the one in which the parties agree on: which country and which court will have jurisdiction over a given litigation between the parties. In many cases, this question is regulated also by individual pieces of legislation, and therefore it is reasonable to obtain the services of competent legal professionals for these issues. (See also the entry of Court selection.)

It should also be noted that in civil law contracts relating to national assets in the territory enclosed by the border of Hungary, the parties may only stipulate the application of Hungarian law and the exclusive jurisdiction of a Hungarian court.

1.2. Alternative settlement of disputes

Due to the fact that, in many aspects, Act CXXX of 2016 changed the fundamentals of the code of civil procedures in Hungary, and Act LX of 2017 on arbitration is also a new act, the application of the "old routine" can be the source of many problems, and therefore it is definitely recommended that the contracting parties use the services of legal professionals in connection with the application of these acts.

However, in order to avoid any judicial proceedings due to these problems, it is strongly recommended that, for the settlement of arising disputes, the concluded contract provide that the contracting parties shall have recourse to an expert or a mediator before court proceedings. The expert should be a person or an organization accepted earlier by the parties in the contract, who/which has been named and has expertise in the given field and gives an opinion typically in technical issues. Since it cannot be excluded that one of the parties will dispute the findings of the appointed expert, it would not be practical for the parties to waive their right to taking their given dispute to court when employing an expert − although a preliminary expert-opinion can clearly help to find a mutually acceptable, good and quick compromise solution, this may not always be the case; court action should be left open for that event.

Mediation is a special procedure for the prevention court proceedings and/or authorities' proceedings or the facilitation of their ending, conflict resolution, and dispute settlement, which can be used for the solution of various controversial situations in the fields of economy and business. The most important characteristic of this mediation procedure is that, in a dispute between two or more parties, a neutral third party, a mediator not involved in the dispute mediates by the voluntary consent of the parties. The mediator, whom the parties select from a register, is independent and impartial, is bound by the obligation of confidentiality, helps to clarify the nature of the conflict and find the solution which is satisfactory to and performable by both parties, and at the same time, the conditions and contents of the agreement are determined not by the mediator but by the parties. In the event of a successful mediation procedure, the parties make a written agreement. However, an agreement made in the course of a mediation procedure does not affect the parties' right to enforce their disputed claim within the framework of court or arbitral proceedings.

However, it is important to know that in a court or arbitral proceeding initiated after the conclusion of a mediation procedure – if the law and the parties do not provide otherwise – the parties cannot rely on

a) a position or opinion taken by the other party in relation to the possible solution of the dispute in the course of the mediation procedure, and

b) on the other party's declaration of acknowledgement and waiver of rights made in the course of the mediation procedure.

It is also important to be aware of the fact that FIDIC-based contracts usually include detailed and worked out procedure system for the settlement of disputes, which includes also the course of procedure and detailed rules of the arbitral proceedings preceding legal action. The Association of Hungarian Consulting Engineers and Architects made special Regulations entitled *"For the Creation, Registration and Operation of the List of AHCEA FIDIC Adjudicators"* In accordance with that the list of adjudicators can be found at http://tmsz.org/hu/dontnokilista.html. It is less well known that, by virtue of their contractual freedom, the parties may also apply these arbitration procedures and refer their case to qualified, professionally skilled adjudicators if they have not concluded a FIDIC contract, thus, it is advisable to use this forum for peaceful reconciliation if necessary.

If the process of dispute settlement by experts or mediators outlined above does not produce satisfactory results for both parties, the case will probably be taken to the court stipulated in the contract.

The Expert Body for the Certification of Performance (TSzSz) is a special forum which can be used in the case of construction works carried out in Hungary, and which, under Act XXXIV of 2013, can act in the case of disputes arising from the performance of architectural-engineering, design, build, and construction contracts – upon the request by those entitled by the act, it issues an expert's opinion if the performance certificate has not been issued, or its issuing is disputed, or the performance certificate has been issued but the payment has not been made. This organization, which has been operating approximately since 2013, works beside the Hungarian Chamber of Commerce and Industry and plays an important role in the resolution of disputes in the construction industry, and/or on design and performance; its services can be obtained in accordance with relatively strict rules of procedure. The opinion of TSzSz can be requested also for the enforceability of the additional obligations securing the contract if the issue of enforcement is disputed between the parties. (See also the entry of the Expert Body for the Certification of Performance.)

The expert's opinion of the Expert Body for the Certification of Performance can be used also in arbitral proceedings.

It is not necessary to regulate the option of appeal to the TSzSz in construction and design contracts, since the law clearly provides for that option.

2. Advantages-disadvantages

Disputes and contradictions between the parties are almost unavoidable in the course of construction procedures. In many cases, the resolution of these is faster and more cost-effective in a peaceful way by means of alternative settlement of disputes. If these fail, then of course, ultimately, the case will be decided by the court – this, however, will be a definitely longer procedure.

3. Relevant major pieces of legislation

Section 1:6 of Act V of 2013 on the Civil Code;
Act LX of 2017 on arbitration;
Section 36 of Act LV of 2002 on mediation activity;
Act XXXIV of 2013 on the organization mediating in the settlement of certain disputes connected to the design and construction of buildings, and on the amendment of certain acts in connection with preventing late payments and the chain of debts in construction matters;
Section 17 (3) of Act CXCVI of 2011 on national assets.

ABBREVIATIONS IN THE TEXT

Áfa-tv = Act CXXVII of 2007 on the value added tax
Épkiv = Government Decree 191/2009. (IX. 15.) on the rules of activities in the construction industry
Étv. = Act LXXVIII of 1997 on the development and protection of the built environment
Jat. = Act CXXX of 2010 on legislation
Kbt. = Act CXLIII of 2015 on public procurement
Pp. = Act CXXX of 2016 on the code of civil procedures
Ptk. = Act V of 2013 on the Civil Code